Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1285

JOHN P. WOOD, et al.,
Petitioners,

vs.

PEGGY STRICKLAND, a Minor, by MR. and MRS. VIRGIL JUSTICE, Her Parents and Next Friends; VIRGINIA CRAIN, a Minor, by DORIS CRAIN, Her Mother and Next Friend,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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PEGGY STRICKLAND, a Minor, by MR. and MRS. VIRGIL JUSTICE, Her Parents and Next Friends; VIRGINIA CRAIN, a Minor, by DORIS CRAIN, Her Mother and Next Friend,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Petitioners[1] pray that a writ of certiorari issue to review the decision by the United States Court of Appeals for the Eighth Circuit in this case.

[1] Petitioners are: John P. Wood, Ed Stevenson, Rachael Goforth, Bob Philpot, Jim Ayleshire, Raymond Stroud, Bill Plunkett, Members of the Board of Education of the Mena, Arkansas Special School District, and the Mena Special School District.

OPINIONS BELOW

The August 29, 1973 opinion of the United States Court of Appeals for the Eighth Circuit is not yet reported and is set forth as Appendix I. The opinion of three judges of the Court of Appeals dissenting from the denial of the petition for rehearing en banc is not reported and is set forth as Appendix III hereto. The decision of the United States District Court for the Western District of Arkansas, Fort Smith Division is reported at 348 F.Supp. 244 (W.D. Ark. 1972) and is set forth as Appendix V.

JURISDICTION

The judgment of the Court of Appeals was entered on August 29, 1973. On September 27, 1973, the Court of Appeals denied a timely filed petition for rehearing, Appendix II. On December 13, 1973, petitioners timely applied to Mr. Justice Blackmun for an extension of time for filing this petition and an order was entered by Mr. Justice Blackmun on December 17, 1973 extending the time for filing of this petition to February 22, 1974. A copy of the last mentioned order is Appendix IV hereto. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254 (1).

QUESTIONS PRESENTED

1. Whether federal courts have jurisdiction to invalidate, on grounds of insufficiency of evidence, a public school board's decision to suspend a tenth grade student for possession and use of intoxicating beverages at a school function on school premises, where the student presents no claim of deprivation of fundamental constitutional rights of speech, association, religion or equality of race or sex, and where the procedures utilized in effecting the suspension have not been held unlawful?

2. Whether a public school board member is entitled to invoke the doctrine of official immunity in a student's civil rights suit under 42 U.S.C. §1983 so as to avoid individual and personal financial liability except where the acts complained of were done with malice?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

and 42 U.S.C. §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT

The Complaint herein was filed by two tenth grade students (and their parents) of the Mena, Arkansas School District against certain administrators of the district, the school district itself and all members of the Board of Education, alleging jurisdiction under 28 U.S.C. §§ 1343 (3) and (4), 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. §§ 1981 and 1983 and deprivation of rights under the Fifth, Fourteenth and Ninth Amendments to the United States Constitution (A. 7-13).[2] The original Complaint sought injunctive and declaratory relief, and by amendment, monetary damages, both compensatory and punitive, were sought from the defendants in their individual capacities and from the school district itself (A. 18-20).

The action complained of was the suspension of the girls for the balance of the school semester because of a school board finding that the students had violated a rule prohibiting possession or use of intoxicating beverages at a school sponsored activity.[3] The girls admitted that they had poured a quantity of alcoholic beverage into punch served at an extracurricular

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[2] Unless otherwise noted, all citations to "A" are to the Appendix in the Court of Appeals.

[3] The relevant rules are as follows:

"3. Suspension

* * * * * * * *

"b. Valid cause for suspension from school on first offense: 'Pupils found to be guilty of any of the following shall be suspended from school on the first offense for the balance of the semester and such suspension will be noted on the permanent record of the student along with reason for suspension.

* * * * * * * *

"(4) The use of intoxicating beverages or possession of same or at a school sponsored activity." Court of Appeals Slip Opinion, p. 2.

school function conducted by the home economics department for parents and students. Court of Appeals Slip Opinion, p. 2.

The case was tried to a jury which failed to reach a verdict, following which the district judge declared a mistrial, granted the petitioners' motions for judgment in accordance with their previous motions for directed verdicts and denied respondents' motion for new trial. Ibid at p. 5. On appeal to the Court of Appeals for the Eighth Circuit, the judgment was reversed and remanded for a new trial on the issue of damages against the individual school board members. The Court of Appeals held that, in its view, there was no evidence before the school board that the beverage used[4] was "intoxicating" within the terms of the rule and that the students had therefore been deprived of substantive due process. The Court also held that the students were entitled to recover damages from school board members in their individual capacities without a showing of malice and upon a showing that the petitioners did not, in light of all the circumstances, act in good faith, objectively determined.

Rehearing was denied, with three judges of the Court of Appeals dissenting in an opinion which contended that the respondents had failed to show deprivation of a federally protected right and that ". . . the substantive reach of the due process clause on the public school campus is limited to the protection of specifically identifiable federal constitutional rights." Slip opinion, p. 2.

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[4] A malt liquor beverage called "Right Time." Court of Appeals Slip opinion, p. 2, and note 2, p. 4.

REASONS FOR GRANTING THE WRIT

This case involves important issues as to the jurisdiction of federal courts to intervene in the day-to-day operations of the public school systems of this country. At issue is the extent to which a public school student has a federally protected right to challenge a school board decision to suspend him from school where the grounds for the suspension do not involve deprivation of any specific constitutional right and the challenge to the suspension rests merely on an alleged lack of substantial evidence supporting the decision. Also involved is the nature and extent of the remedy provided by 42 U.S.C. § 1983 to a student, assuming he has been deprived of a federal right, against members of boards of education of public school districts in their **individual** capacities.

In its decision below, the panel of the Court of Appeals for the Eighth Circuit held that it had jurisdiction to invalidate as violative of substantive due process the Mena Board of Education's decision to suspend two female tenth grade students after having found them to have violated a rule prohibiting possession and use of intoxicating liquors at school functions. The Court of Appeals premised its finding of a constitutional violation on the alleged lack of proof that the alcoholic beverages admittedly used by the students were in fact "intoxicating." Reasoning that no violation of the rule had thus been established, the Court of Appeals equated that with a violation of substantive due process and held the suspensions invalid. The petitioners herein filed a petition for rehearing by the Court of Appeals en banc and were joined in such petition by the Arkansas School Board Association as amicus curiae. Rehearing was denied, three judges dissenting.

Questions relating to the propriety of federal court intervention in matters of public school administration are not new, and the basic principles of intervention are settled. Although

"[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," **Shelton v. Tucker,** 364 U.S. 479, 487 (1960), nevertheless this Court has ". . . repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." **Tinker v. Des Moines Community School District**, 393 U.S. 503, 507 (1969). And in **Epperson v. Arkansas,** 393 U.S. 97 (1968), this Court stated:

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems **and which do not directly and sharply implicate basic constitutional values."** (Emphasis supplied.)

The holding of the Court of Appeals in this case is a drastic departure from those settled principles and will vastly increase the frequency and extent of judicial interposition in public school matters. Petitioners contend that there is nothing in this case which ". . . sharply implicates basic constitutional values," *Ibid,* and that the students herein have not established deprivation of a federal right. Three judges of the Court of Appeals agreed in an opinion by Chief Judge Mehaffy dissenting from the denial of rehearing, who observed:

> "This is not a case where the school board has invaded federally protected areas of speech, association, religion, or equality of race or sex. Nor is this a case where the procedure accorded the students was inadequate, unreasonable, or unfair. Instead, as the panel itself concludes,

this is a case where the school board has established a reasonable rule, the students had notice of the rule, the students by their own admission had violated the rule, and, after full procedural protection was afforded, the rule was enforced. Under such circumstances I fail to perceive any federal constitutional question in appellant's attack." Slip Opinion, p. 2.

Of course, federal courts have jurisdiction to protect students and teachers whose rights of speech, association, religion or equality of race or sex have been infringed by school administrators or board members. See, e.g., **Tinker,** *supra*; **Pickering v. Board of Education,** 391 U.S. 563 (1968); **Swann v. Charlotte-Mecklenburg Board of Education,** 402 U.S. 1 (1971). However, in the absence of deprivation of such specific fundamental federal rights, a teacher or student's challenge presents no federal question. See e.g., **Freeman v. Gould Special School District,** 405 F.2d 1153 (8th Cir. 1969), cert. denied 396 U.S. 843; **Murray v. West Baton Rouge Parish School Board,** 472 F.2d 438, 444 (5th Cir. 1973). And it is equally clear that education itself is not a federally protected right. See **San Antonio School District v. Rodriquez,** — U.S. —, 36 L.Ed.2d 16 at pages 44-46, where the majority opinion of this Court states in connection with its discussion as to the proper standards by which to judge the constitutionality of school finance systems, as follows:

> "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation."
>
> * * * * * * *
>
> "We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive. In one further respect we find this a particularly inappropriate case in which to subject state action to strict judicial scrutiny. The present case, in another basis sense, is significantly different from any of the cases in which the Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of our prior cases involved legislation which 'deprived,' 'infringed,' or 'interfered' with the free exercise of some **fundamental personal right or liberty**." (Emphasis supplied.)

Thus the finding herein of a violation of federal "substantive due process" rests on nothing more than the Court of Appeals' conclusion that the suspension decision was "wrong," or unsupported by substantial evidence.

But, even assuming a student or teacher is the subject of an erroneous decision **not** involving basic constitutional rights, grievances arising out of merely erroneous decisions by state and local officials do not rise to constitutional proportions. This Court, the Court of Appeals for other circuits, and the Eighth Circuit itself have so held. **Snowden v. Hughes,** 321 U.S. 1 (1943)[5]; **Gryger v. Burke,** 334 U.S. 728 (1948);[6] **Larson v. Domestic & Foreign Commerce Corp.,** 337 U.S. 682 (1949);[7]

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[5] "(A) construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored." **Snowden v. Hughes,** 321 U.S. at 11.

[6] "We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question." **Gryger v. Burke,** 334 U.S. 728, 731.

[7] "It is argued that an officer given the power to make decisions is only given the power to make correct decisions. * * * We have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so." **Larson v. Domestic & Foreign Commerce Corp.,** 337 U.S. 682, 695 (1949).

Murray v. West Baton Rouge Parish School Board, 472 F.2d 438, 444 (5th Cir. 1973); **Shock v. Tester,** 405 F.2d 852 (8th Cir. 1969) cert. denied 394 U.S. 1020; **Scheelhaase v. Woodbury Central Community School Dist.,** — F.2d — (8th Cir., No. 73-1067, Nov. 28, 1973). The matter is precisely stated (in the public school context) in **Murray,** *supra* at p. 444:

> "In order to avoid any misinterpretation and even at the risk of redundancy, we conclude by emphasizing that the Constitution is not fenced out of the school grounds, but that every barb felt by students or parents in the school fence is not constitutionally offensive. Although we shall not hesitate to use our constitutional clippers where appropriate, we cannot forget that a public school principal retains considerable freedom to administer his realm. For better or for worse, our jurisdiction attaches only when the Constitution has been violated—not every time a principal acts arbitrarily or unfairly. In affirming the dismissal of this claim we are in no way passing on the propriety or wisdom of the disciplinary and testing practices of West Baton Rouge Parish. We merely held that on the facts of this case, plaintiffs have totally failed to prove a deprivation of any constitutional right."

And in **Scheelhaase,** *supra*, it was said:

> "In the performance of its duties the Board (of Education) is empowered to act in accordance with its best discretion. It is possible that the discretion of a Board may, at times, to those more generously endowed, seem to have been exercised with a lack of wisdom. But the Board's decisions in the exercise of its discretion are not vulnerable to our correction merely if they are 'wrong,' sustainable only if they are 'right.' " Slip Opinion, p. 8.

The implications of the Court of Appeals holding are clear. As noted by the Chief Judge in dissenting from the denial of rehearing:

> "I am, of course, aware that 'substantive due process' has in the past been used without regard to any specific constitutional safeguard to attack a wide variety of state action. E.g. **Lochner v. New York,** 198 U.S. 45 (1905); **Coppage v. Kansas,** 236 U.S. 1 (1915). But I thought the federal judiciary had long since rejected such a free-wheeling use of 'substantive due process' because it inevitably had led to an unwarranted invasion of the duties and responsibilities of state and local governments. E.g. **Ferguson v. Skrupa,** 372 U.S. 726 (1963). None of the cases cited by the panel supports such an unfettered reading of the due process clause; instead, all of the cases involved attacks either on the procedure accorded or on an alleged invasion of some specifically protected right such as free speech. **I fear that the panel's opinion now places every federal court, at least in this circuit, in the position of serving as a board of appeal for every disciplined public school student who feels that his punishment was too severe or that the school board's decision was not supported by substantial evidence.** I feel that this function is one that is the sole responsibility of the state and local governments, which in this case have long provided an appropriate judicial remedy. E.g. **Douglas v. Campbell,** 89 Ark. 254, 116 S.W. 211 (1909)." Slip Opinion, pp. 2-3. (Emphasis supplied.)

This Court is familiar with the virtual "explosion" of litigation initiated by disgruntled, non-tenured school teachers seeking to challenge decisions not to renew their teaching contracts even though no cognizable federal claim was involved. And in **Board of Regents v. Roth,** 408 U.S. 564 (1972) and **Perry v. Sinderman,** 408 U.S. 593 (1972) this Court acted to resolve that controversy so as to make clear that, absent deprivation of a federal right of liberty or property, such decisions are a matter of local concern properly within the discretion of school authorities. Petitioners submit that the considerations involved in

student disciplinary matters have now reached comparable proportion and warrant grant of this petition to resolve the question. The need for resolution is greater in the student context, for public school authorities cannot long maintain discipline and a proper atmosphere for learning with the ever present threat of the necessity for abandoning their educational responsibilities to appear in federal court at the behest of a disgruntled student or parent and attempt to convince a federal judge of the correctness of suspension decisions. Nor should federal judges lacking in educational expertise be continuously called upon to intrude into the day-to-day operation of the public schools.

Coincident with its substantive due process holding expanding the scope of federal jurisdiction in student disciplinary matters, the Court of Appeals also has increased the exposure of public school board members to liability for monetary damages in suits by students alleging deprivation of civil rights. The panel held that a public school board member is individually liable for financial damages if, in a student's civil rights action under 42 U.S.C. §1983, it is established that the board member "did not, in the light of all the circumstances," act in good faith, objectively determined. Slip opinion, p. 9. Although the opinion does not elaborate on the exact substance of that standard of conduct, one of the authorities cited by the panel suggests that it means "being right." **Weddle, Damages Under §1983: The School Context,** 46 Ind. L.J. 521 at 530, note 56 (1970-71).

Although this Court has frequently considered the doctrine of public official's immunity from financial damages,[8] it has not done so in the context of public school officials. As a result, the various decisions considering the extent to which a school board member is immune from individual financial liability for

[8] See e.g. **Bradley v. Tisher,** 84 U.S. 335; **Barr v. Matteo,** 360 U.S. 564 (1959); **Pierson v. Ray,** 386 U.S. 547 (1967); **Doe v. McMillan,** 412 U.S. 306 (1973).

his actions are in pronounced conflict. Compare the opinion of the panel below with **McLaughlin v. Tilendis,** 398 F.2d 287 (7th Cir. 1968) (apparently recognizing a form of absolute privilege conditioned on an adequate justification for the action taken) and **Smith v. Losee,** 485 F.2d 334 (10th Cir. 1973) (privilege conditioned on "affirmative showing that the decision [challenged] . . . was . . . an exercise of . . . discretion vested in it by state law, made in good faith and without malice, when the official facts . . . showed a good and valid reason for the decision although another reason . . . advanced . . . may have been constitutionally impermissible.")

The three separate opinions in **Smith v. Losee,** *supra* (a teacher dismissal case) accurately portray the nature of the conflicting approaches of the various circuits and the need for clarification. Judge Barrett, partially dissenting and partially concurring, states that the proper standard to determine individual liability under §1983 is malice and that absent malicious acts, school authorities should not be liable. 485 F.2d at 346. Conceding that the Court was venturing "into a previously uncharted sea," *ibid*, Judge Barrett decries the majority opinion's lack of precision:

> "The practical effect of leaving the standard of privilege undefined insofar as it relates to those administrators charged by law to exercise discretion in the subject areas to inform and advise the Board is that henceforth I am fearful that such persons shall no longer serve the intended public interest. **At the risk of personal money judgments, they shall not recommend against tenure or non-renewal regardless of their good faith belief that certain persons should not be retained on the faculty.** I simply cannot be a party to such a result." 485 F.2d at 347. (Emphasis supplied.)

Noting that the prospect of school officials having to pay judgments from their personal assets was "frightening," 485 F.2d at 349,

> "The risk of personal judgments in the exercise of discretion relative to contract tenure and renewal confronting persons serving in administrative positions such as appellants Losee, Barnum and Peterson will almost certainly guarantee one result: Henceforth those in like positions shall not recommend against tenure or contract non-renewal regardless of their good faith beliefs otherwise. They simply cannot afford to be wrong when error hits their pocketbooks personally. Such a result does not speak well for the future of our system." 485 F.2d at 350.

In his dissent in **Smith,** Judge Doyle agrees that the majority's failure to adequately resolve the issue is "unfortunate" and bound to lead to diverse results in the trial courts.

The federal district court decisions reflect a similar conflict. Some appear to recognize an absolute immunity (see **Derby v. University of Wisconsin,** 325 F.Supp. 163 (E.D.Wis. 1971); **Lessard v. Von Dale,** 318 F.Supp. 74 (E.D.Wis. 1970); and **Abel v. Gousha,** 313 F.Supp. 1030 (E.D.Wis. 1970), while others impose qualifications on the immunity (see **Gouge v. Joint School District No. 1,** 310 F.Supp. 984 (W.D.Wis. 1970), and **Schreiber v. Joint School District,** 335 F.Supp. 74 (E.D. Wis. 1972).

It is clear that common law immunities are available as a defense in actions under § 1983. **Pierson v. Ray,** 386 U.S. 547 (1967). Likewise, the reasons supporting the immunity defense are well-established. In **Gregoire v. Biddle,** 177 F.2d 579 (2nd Cir. 1949), Judge Learned Hand made the following observations:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others or for any other personal motive not connected with the public good, should not escape liability for the injuries . . . he may so cause; and, if it were possible in practice

> to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials . . . to the burden of a trial and to the inevitable danger of its outcome, would damper the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith."

See also **Bauers v. Heisel,** 361 F.2d 581 (3rd Cir. 1966), listing the arguments in favor of immunity, as *inter alia,* the danger of influencing public officials by threat of a lawsuit, the deterrent effect of potential liability on men who are considering entering public life, the drain on the valuable time of the official caused by insubstantial suits, the feeling that the ballot and formal removal proceedings are more appropriate ways to enforce honesty and efficiency of public officers.

Petitioners submit that official immunity considerations are nowhere more important than in suits by public school students against school administrators and board members, particularly since the latter serve from wholly altruistic motives without remuneration other than public recognition and appreciation for a job well done. The writ should be granted to permit this Court to authoritatively resolve the current conflicting views and to articulate definitive guidelines for uniform disposition of suits against school authorities.

CONCLUSION

For the foregoing reasons it is submitted that a writ of certiorari should issue to review the August 29, 1973, decision by the Court of Appeals for the Eighth Circuit in this case.

Respectfully submitted

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APPENDIX

APPENDIX I

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 72-1774

Peggy Strickland, a Minor, by Mr. and Mrs. Virgil Justice, Her Parents and Next Friends; Virginia Crain, a Minor, by Doris Crain, Her Mother and Next Friend,

Appellants,

v.

S. L. Inlow, Duddy Waller, John P. Wood, Ed Stevenson, Rachael Goforth, Bob Philpot, Jim Ayleshire, Raymond Stroud, Bill Plunkett and Mena Special School District,

Appellees.

Appeal from the United States District Court for the Western District of Arkansas.

Submitted: May 15, 1973.

Filed: August 29, 1973.

Before GIBSON, HEANEY and ROSS, Circuit Judges.

HEANEY, Circuit Judge.

We are concerned on this appeal with the propriety of District Court action denying relief to two high school students who

were given lengthy suspensions from school for allegedly violating school regulations with respect to the possession and use of intoxicating liquors at a school function on school premises.

Peggy Strickland, Virginia Crain and Jo Wall were tenth grade students at Mena High School, Mena, Arkansas, when this controversy arose. On February 18, 1972, the three girls were accompanied to the principal's office by Mrs. Curtis Powell, a home economics teacher, where they volunteered to Mr. Waller that they had "spiked" the punch at a recent extracurricular home economics class function. They related to him, through Mrs. Powell, that on the day of the spiking incident, someone (it is not clear who) suggested that the punch be spiked. The three girls obtained permission to leave the campus and traveled to a tavern in Oklahoma where Jo Wall purchased two 12-ounce bottles of a flavored malt beverage, "Right Time." The three students then purchased six 10-ounce containers of a soft drink and combined the total eighty-four ounces of liquid in a milk carton, and returned with the mixture to school. To the liquid was then added enough water to total one and one-half gallons of punch, which was served at the gathering.

A disciplinary regulation of the Mena Special School District provides:

> "3. Suspension
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> • • • • • • • •
>
> "b. Valid cause for suspension from school on first offense: "Pupils found to be guilty of any of the following shall be suspended from school on the first offense for the balance of the semester and such suspension will be noted on the permanent record of the student along with reason for suspension.
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> • • • • • • • •
>
> "(4) The use of intoxicating beverages or possession of same or at a school sponsored activity."

Pursuant to this regulation, Principal Waller suspended the three girls from classes and extracurricular activity for one week, and told them that ultimate disposition would be in the hands of the School Board. He added, however, that he and Mrs. Powell would intercede for them and ask for leniency.

Without adequate notice to the students and with no notice to their parents, a special meeting of the School Board was held the night of February 18 to consider the matter. The only people in attendance were the members of the Board, Mr. Inlow, Mr. Waller and Mrs. Powell. Mrs. Powell relayed the girls' statements to the Board and she, along with Mr. Waller, recommended leniency. Shortly after these recommendations were made, a telephone call was received by Mr. Inlow. The caller was Mrs. Powell's husband, also a teacher at the school. He informed Mr. Inlow that he (Powell) had been told that Jo Wall had been involved in an altercation with another student after a basketball game that evening. Mr. Inlow then informed the Board of the substance of his conversation with Powell, leaving out the name of the student involved. With this, Mrs. Powell and Principal Waller withdrew their recommendations and "washed their hands" of the matter. The Board voted to suspend all three students for the balance of the semester.[1]

The School Board considered the matter for a second time on March 2, 1972. Present at this meeting were the members of the Board, Mr. Inlow, the appellants, their parents and counsel for the appellants and appellees. Neither Mr. Waller nor Mrs. Powell, the only two who had testified at the February 18 meeting, was present, although they were in their respective offices in the building during this time. The Board presented a written

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1 The practical effect of the suspension was to cause the girls to fail their entire sophomore year. It will be possible for them to graduate with their class, but they must complete three academic years in two by taking an increased course load during their final two years in school.

statement, which it described as a statement of facts found by it.[2] The students related their story to the Board and offered their apologies. The Board voted to uphold the suspension, and the hearing ended.

Thereafter, two of the students—Strickland and Crain— commenced an action in United States District Court under 42 U.S.C. §1983. They alleged that they had been deprived of the right to attend school without benefit of due process. They asked that they be reinstated, that the defendants be enjoined from imposing sanctions, and that the rule with respect to intoxicants be declared invalid and void. After an evidentiary hearing on a motion for a preliminary injunction, the District Court urged the appellees to reinstate the students, but refused to order the Board to take such action, apparently on the grounds that the students had not made an adequate showing of irreparable injury and had failed to convince the court that they were likely to prevail on the merits.

The students subsequently amended their complaint, adding a prayer for damages. The matter was then tried to a jury. The defendants moved for a directed verdict, apparently at the close of the plaintiffs' case. This motion was denied. After the jury failed to reach a verdict, the court declared a mistrial. The

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2 "*FACTS FOUND BY SCHOOL BOARD*

"1. That Virginia Crain, Peggy Strickland and Jo Wall are students of Mena High School and subject to the governing rules and policies of Mena High School.

"2. That on or about February 7, 1972 these three girls were charged with the responsibility of providing refreshments for a school function, being a gathering of students of the Home Economic class and some of their parents, on school premises, being the auditorium building of Mena High School, and being under the direction of Mrs. Curtis Powell.

"3. That the three girls in question traveled to Oklahoma, purchased a number of bottles of malt liquor, a beer type beverage, and later went onto school premises with the alcoholic beverage and put two or more of the bottles of the drink into the punch or liquid refreshment which was to be served to members of the class and parents."

court subsequently granted the defendants' motions for judgment in accordance with their motions for a directed verdict and denied the plaintiffs' motion for a new trial.[3]

The students contend on appeal that the trial court erred: in denying them equitable relief; in failing to declare the rule with respect to the possession or use of intoxicating beverages invalid; in erroneously instructing the jury with respect to good faith as a defense; and in refusing to grant the students a new trial.

The law with respect to the rights of students is still developing. We think it is clear, however, that the following general principles are reasonably well established. The responsibility for public education is primarily the concern of the states. The exercise of this responsibility, however, must be consistent with federal constitutional requirements.[4] School boards have the right to adopt reasonable rules and regulations governing the conduct of high school students[5] and regulations proscribing the possession or consumption of intoxicating beverages by students at school functions are reasonable. Students cannot, however, be given lengthy suspensions for violating valid rules without being accorded substantive and procedural due process. If they are given such a suspension without the benefit of due process, they may bring a §1983 action for declaratory and injunctive relief against the school district, the school board and those administrators involved in the decision.[6] They may also

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3 The opinion of the trial court is published at 348 F.Supp. 244 (W.D. Ark. 1972).

4 *Jones* v. *Snead*, 531 F.2d 1115 (8th Cir. 1970).

5 *Tate* v. *Board of Ed. of Jonesboro, Ark., Spec. Sch. Dist.*, 453 F.2d 975 (8th Cir. 1972); *Esteban* v. *Central Missouri State College*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

6 *Jones* v. *Snead, supra; Tate* v. *Board of Ed. of Jonesboro, Ark., Spec. Sch. Dist., supra; Farrell* v. *Joel*, 437 F.2d 160 (2nd Cir. 1971); *Esteban* v.

meeting and were given an opportunity to present evidence.[10] But we need not decide whether, in fact, the meeting did so because the students were denied substantive due process at both meetings.

To justify the suspension, it was necessary for the Board to establish that the students possessed or used an "intoxicating" beverage at a school-sponsored activity. No evidence was presented at either meeting to establish the alcoholic content of the liquid brought to the campus. Moreover, the Board made no finding that the liquid was intoxicating. The only evidence as to the nature of the drink was that supplied by the girls, and it is clear that they did not know whether the beverage was intoxicating or not. The District Court recognized this void in its March 7 findings of fact. It stated:

> "I have had grave questions throughout this trial as to whether this concoction from which these students got such a terrific charge was ever an intoxicating beverage. * * * [T]he term 'intoxicating beverage' as used in the manual is not defined but the term 'intoxicating liquid' is certainly well defined under the Arkansas laws and it provides that it must be a content in excess of 3.2 or 5 per cent by weight and I am afraid the School Board is or has made a mistake here but I do not see any constitutional thing within the jurisdiction of this Court that requires any intervention by the Court at this time on the temporary application. If it ever reaches the matter of proof on the intoxicating angle I don't think you will ever be able to prove that thing there—

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[10] See, *Pervis* v. *LaMarque Independent School District*, 466 F.2d 1054 (5th Cir. 1972). In that case, the Court ruled that where students were suspended without a hearing for three months, a subsequent hearing did not cure the initial constitutional deprivation. The Court, in discussing the dangers inherent in the contrary view, states at 1058:

> "* * * How, then, could they have been made whole? They would have lost some 3 months of education. This result cannot obtain. Procedural due process must, on the facts present in this case, be given prior to imposition of serious suspensions."

bring an action for damages against the individual members of the board and the administrators of the school system who participated in the decision.[7] Good faith is a defense in damage actions, but not in actions for equitable relief.[8] With these general principles in mind, we turn to the issues raised here.

We believe that the regulation which prohibits the possession or consumption of intoxicants by Mena High School students at school or at a school function is reasonable.[9]

We hold that the suspensions for the balance of the semester imposed by the Board were severe enough to require that due process be afforded the affected students. They resulted in the girls effectively losing nearly a full year's credits.

We think it clear that the students were denied procedural due process at the February 18 meeting of the Board. Their parents were not notified of the meeting, and were not given an opportunity to appear at it. We recognize that the March 2 meeting may have cured the procedural defects because it was held promptly after the suspension, and because the students and their parents were given notice of the time and place of the

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Central Missouri State College, supra; Wasson v. *Trowbridge*, 382 F.2d 807 (2nd Cir. 1967); *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). See also, "Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education," 45 F.R.D. 133, 147 (W.D. Mo. 1968).

[7] *Gouge* v. *Joint School District No. 1*, 310 F.Supp. 984 (W.D. Wis. 1970).

[8] *Gouge* v. *Joint School District No. 1, supra*. See, 2 T. Emerson, D. Haber & N. Dorsen, Political and Civil Rights in the United States (3rd ed. 1967).

[9] Although the regulation seems to call for mandatory suspension for the balance of the semester and the "Administrative Policies" for the Mena Public Schools do not provide for a hearing in the event of expulsion or suspension, we need not discuss the appellants' challenge of the regulation on those grounds. The Board apparently did not view the regulation as restricting their actions, for they did hold a belated hearing and did consider imposing a less severe penalty.

in spite of the fact that these little girls giggled around and got themselves kicked out of school on such a silly thing— I don't think you will ever be able to prove that that stuff is intoxicating."

For reasons not apparent from the record before us, the court failed to discuss this absence of evidence in its final opinion and made no finding that the School Board had determined that the beverage brought to the school by the girls was intoxicating. Under these circumstances, we have no alternative but to find that the students were denied substantive due process and that they were entitled to have their records cleared and to be reinstated. As reinstatement is no longer possible, the students are entitled to have their records cleared and to be relieved of any punishments that may be of a continuing nature.

Lest we be misunderstood, we make it clear that the School District can prohibit the use and possession of any *alcoholic beverages* if it desires, or it may continue its present policy and bar intoxicating beverages only.

We turn then to the question of whether the trial court properly directed a verdict against the students as to their claim for damages as against all defendants.

The directed verdict was appropriate as to the School District because under the doctrine of *Monroe* v. *Pape*, 365 U.S. 167 (1961), a school district is immune from damages in a §1983 action.[11]

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11 We note here that an exception to the *Monroe* rule has been developed in that line of cases following *Harkless* v. *Sweeney Independent School District*, 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971). That Court held that claims for back pay by teachers are part of the equitable relief for reinstatement and not damages. See, *United States of America* v. *Cotton Plant School District No. 1, et al.*, Nos. 72-1583, 72-1615 (8th Cir. June 6, 1973); *Board of Ed. of Chidester Sch. Dist. No. 59, Ark.*, 448 F.2d 709 (8th Cir. 1971).

It was appropriate as to Superintendent Inlow and Principal Waller because there is no evidence in the record to support a claim against them. Neither had a vote in the suspension proceedings and neither recommended that the girls be suspended.

It was inappropriate as to the individual School Board members because the record shows clearly that the plaintiffs established that they had been suspended without regard to substantive due process and the defense of good faith was not established as a matter of law. Moreover, the court took an erroneous view of the law. It instructed the jury that the plaintiffs had to prove that the defendants acted with malice toward the plaintiffs. No such specific intent need be proved to recover compensatory damages. It need only be established that the defendants did not, in the light of all the circumstances, act in good faith. The test is an objective, rather than a subjective, one.[12] The appellants must accordingly be given a new trial on the issue of damages with respect to the defendant School Board members.

We remand to the District Court for action consistent with this opinion. An attorney's fee in the sum of $500.00 is awarded to counsel for the appellants. Costs will be taxed against the appellees.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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12 *McLaughlin* v. *Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Gouge* v. *Joint School District No. 1, supra.* See generally, WASH. U. L. QTLY 666 (1971); Weddle, Damages Under §1983: The School Context. —— IND. L. J. 521 (————).

APPENDIX II

United States Court of Appeals
for the Eighth Circuit

No. 72-1774 September Term, 1973

Peggy Strickland, etc., et al.,
Appellants,

vs.

S. L. Inlow, et al.,
Appellees.

Appeal from the United States District Court for the Western District of Arkansas.

The Court having considered petition for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

September 27, 1973

APPENDIX III

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 72-1774

Peggy Strickland, etc., et al.,
Appellants,

vs.

S. L. Inlow, et al.,
Appellees.

On Petition for Rehearing.
Appeal from the United States District Court for the Western District of Arkansas.

Filed: October 18, 1973.

MEHAFFY, Chief Judge, joined by STEPHENSON and WEBSTER, Circuit Judges, dissenting from denial of the petition for rehearing en banc.

The appellees in this case have filed a petition pursuant to *Fed. R. App. P.* 40 for a rehearing with suggestion for a rehearing en banc. The Arkansas School Boards Association has joined as amicus curiae in support of the appellees' petition. After an examination of the panel's opinion in this case and of the above-mentioned petitions I voted to grant a rehearing en banc. Although a majority of the active judges of this court voted to deny appellees' petition, I feel compelled to respect-

fully dissent from the denial of the petition for rehearing en banc.

My principal disagreement with the panel's opinion involves its use of substantive due process as the basis for reversal. I fully recognize that a public high school student has a very strong interest in his or her education. I also recognize that the student's interest in public education enjoys very important procedural and substantive federal constitutional protection from certain types of unwarranted state action. I cannot agree, however, with the panel's conclusion that the due process clause of the fourteenth amendment empowers this or any other federal court to review every public school disciplinary action on the basis of sufficiency of the evidence. Instead, I am firmly convinced that the substantive reach of the due process clause on the public school campus is limited to the protection of specifically identifiable federal constitutional rights.

This is not a case where the school board has invaded federally protected areas of speech, association, religion, or equality of race or sex. Nor is this a case where the procedure accorded the students was inadequate, unreasonable, or unfair. Instead, as the panel itself concludes, this is a case where the school board had established a reasonable rule, the students had notice of the rule, the students by their own admission had violated the rule, and, after full procedural protection was afforded, the rule was enforced. Under such circumstances I fail to perceive any federal constitutional question in appellants' attack.

I am, of course, aware that "substantive due process" has in the past been used without regard to any specific constitutional safeguard to attack a wide variety of state action. *E.g.*, *Lochner* v. *New York*, 198 U.S. 45 (1905); *Coppage* v. *Kansas*, 236 U.S. 1 (1915). But I thought the federal judiciary had long since rejected such a free-wheeling use of "substantive due process" because it inevitably had led to an unwarranted in-

vasion of the duties and responsibilities of state and local governments. *E.g.*, *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963). None of the cases cited by the panel supports such an unfettered reading of the due process clause; instead, all of the cases involved attacks either on the procedure accorded or on an alleged invasion of some specifically protected right such as free speech. I fear that the panel's opinion now places every federal court, at least in this circuit, in the position of serving as a board of appeal for every disciplined public school student who feels that his punishment was too severe or that the school board's decision was not supported by substantial evidence. I feel that this function is one that is the sole responsibility of the state and local governments, which in this case have long provided an appropriate judicial remedy. *E.g.*, *Douglas* v. *Campbell*, 89 Ark. 254, 116 S.W. 211 (1909).

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX IV

Supreme Court of the United States

No. A-606

S. L. Inlow, et al.,
Petitioners,

v.

Peggy Strickland, etc., et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 22, 1974.

S/ HARRY A. BLACKMUN
Associate Justice of the Supreme Court of the United States

Dated this 17th day of December, 1973.

APPENDIX V

Peggy Strickland, a minor, by Mr. and Mrs. Virgil Justice, her Parents and Next Friends, and Virginia Crain, a minor, by Doris Crain, her Mother and Next Friend, Plaintiffs,

v.

S. L. Inlow et al., Defendants.

Civ. No. FS 72-C-11.

United States District Court,
W. D. Arkansas,
Fort Smith Division.

Sept. 29, 1972.

MEMORANDUM OPINION

Paul X Williams, District Judge.

The plaintiff, Peggy Strickland, is a minor and brought this action through and by her parents, Mr. and Mrs. Virgil Justice, as her next friends. The plaintiff, Virginia Crain, is a minor and brought this action by and through her mother, Doris Crain, as next friend.

The defendant, S. L. Inlow, was at all times pertinent herein the Superintendent of Schools at Mena, Arkansas and employed as such by the Board of Education of the defendant, Mena Special School District. The defendant, Duddy Waller, was at all times pertinent herein the Principal of the High School at Mena, Arkansas, employed as such by the Board of Education of Mena Special School District. All other personnel de-

fendants are members of the Board of Education for the Mena Special School District, and were serving at all times pertinent herein. This action is brought against each defendant in both his or her individual capacity and official capacity with the Mena Special School District. The defendant School District is the political sub-division and arm of the government of the State of Arkansas charged with the responsibility of conducting the public schools for Mena Special School District in Polk County, Arkansas.

All parties hereto are residents of Polk County, Arkansas except Mena Special School District and it is located in Polk County, Arkansas.

On and prior to February 18, 1972, plaintiffs were duly enrolled as students in the High School in Mena, Arkansas, both in their sophomore year, and were attending said school regularly and in good standing, making passing grades and neither having ever been subjected to any disciplinary procedure before February 18, 1972.

At some time prior to February 18, 1972 the defendants or their predecessors had promulgated as a part of the school policy a certain rule and regulation as follows:

"3. Suspension

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b. Valid causes for suspension from school on first offense: Pupils found to be guilty of any of the following shall be suspended from school on the first offense for the balance of the semester and such suspension will be noted on the permanent record of the student along with reason for suspension.

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4. The use of intoxicating beverage or possession of same at school or at a school sponsored activity."

On February 18, 1972 the plaintiffs were both expelled from the Mena Public Schools for one week by the defendant Duddy Waller on a charge of having violated the foregoing rule and on February 18, 1972, the defendant School Board expelled the plaintiffs for the balance of the semester on the same charge.

Following their expulsion by the School Board the plaintiffs, with their parents present, met with the defendants Inlow and Waller and were told of the action of the Board—that it was based on the foregoing rule—that the Board considered the rule mandatory and that they had no choice but to make the expulsion for the balance of the school term. The parents of the plaintiffs requested the defendants Inlow and Waller to call a special meeting of the Board but the defendants declined to do so. The plaintiffs then employed counsel and upon their attorney's request, the School Board held a special meeting on March 2, 1972 at which the plaintiffs, their parents and their attorney were present.

At the hearing the girls freely admitted they had added two 12 ounce bottles of a flavored malt liquor beverage called "Right Time" to one and a half gallons of punch at a school function held on February 7, 1972 for the purpose of "spiking the punch."

They expressed regret for the childish prank and asked that the School Board change its policy of suspension for a semester as punishment for the violation.

The School Board, after hearing all the offered evidence, voted not to change the school policy and to expel the young ladies for the remainder of the semester. It also made provision through its school counselor that the girls could follow a course of instruction including some correspondence course in English from the University of Arkansas that would enable the girls to graduate with their class if they did the required work.

The plaintiffs then amended their Complaint and alleged as follows:

"The actions of the defendants as specified in the Complaint heretofore filed in this cause, and each of them, has damaged each of these plaintiffs by depriving them, unlawfully, of their right to attend the public school at Mena, Arkansas, and by forcing them to pursue some substitute means of education at their expense and inconvenience; and further has caused and will continue to cause humiliation and embarrassment to the plaintiffs by reason of the stigma attached to the action of the defendants in assessing excessive punishment by way of expulsion of each of the plaintiffs for the balance of the term and for enforcement of the School Board policy under color of State Law requiring the making of a record of the unlawful punishment assessed against these plaintiffs, which record will continue to follow, harass, intimidate, abuse and embarrass the plaintiffs for the remainder of their lives. In addition, the plaintiffs have been and are being compelled to litigate with the defendants their right to attend the public schools of Mena, Arkansas, at great inconvenience and expense and will continue to do so until this litigation is terminated.

The plaintiffs further allege that the actions of the defendants have been taken with malice toward these plaintiffs and without any bases therefor and with such wanton disregard of the rights of these plaintiffs as to subject themselves personally and individually, and as to subject the school district which they represent, to punitive damages in this case in the amount of $5,000.00 for each defendant herein.

Wherefore, the plaintiffs pray judgment against the defendants and each of them, in their personal and individual capacities respectively, and against the defendant school district, jointly and severally, in the amount of $25,000.00 as compensatory damages for each plaintiff herein; and reasonable attorney's

fees, and further pray judgment against each defendant, personally and individually, and against the defendant school district, for punitive damages in the amount of $5,000.00 against each such defendant. The plaintiffs further pray judgment for all of their costs herein laid out and expended."

The case was tried to a jury. At the conclusion of all of the evidence each defendant made a motion for a directed verdict in his favor as to each plaintiff.

The Court overruled the motions and submitted the case to the jury. The jury was unable to reach a verdict and a mistrial was declared.

Each defendant, pursuant to Rule 50(b) of Federal Rules of Civil Procedure, within 10 days after the jury was discharged, moved for judgment in accordance with his motion for directed verdict—and each of those motions is now under consideration by the Court.

There can be no question as to the propriety of the procedure adopted by each of the defendants. In addition to following the letter of the law as set forth in Rule 50(b) the exact procedure was approved by the Court of Appeals for the 8th Circuit in the case of Watkins v. Oaklawn, 183 F.2d 440 in affirming (D.C.) 86 F.Supp. 1006, a case decided by Hon. John E. Miller in 1949.

The mechanism that makes Rule 50(b) constitutionally valid is the provision that "whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion," and it will be deemed to have reserved decision even if it has denied the motion. Lowden v. Denton (8th Cir. 1940), 110 F.2d 274, cert. denied 310 U.S. 652, 60 S.Ct. 1100, 84 L.Ed. 1417.

It has been held that the Court may not order a new trial until the parties who had moved for a directed verdict have the opportunity this 10 day period provides them in which to move for judgment. Grace Lines, Inc. v. Motley (2nd Cir. 1971), 439 F.2d 1028.

Whether the evidence is sufficient to create an issue of fact for the jury is solely a question of law to be determined by the Court.

In the 8th Circuit a scintilla of evidence is not enough. The question is not whether there is literally no evidence but whether there is evidence upon which the jury could properly find a verdict for that party.

It is not for the Court to weigh the evidence or pass on the credibility of witnesses; and the Court must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence.

Following and observing these guidelines we come to a consideration of the evidence in the cases at bar.

The evidence clearly shows that the young ladies were expelled from school pursuant to declared school policy which had been in force for several years after they frankly confessed to "spiking the punch" with two bottles of "Right Time", a malt liquor.

It is fair to say that both plaintiffs and their attorney concede that they put the malt liquor in the punch intentionally.

The plaintiffs themselves concede that they violated the school policy, but that suspension for the remainder of the semester was too severe a penalty.

The attorney for the plaintiffs ably argued and urged that in spite of what his clients said, there was actually no violation

of the policy because the alcoholic content of "Right Time" is so low that it does not and did not constitute a violation of the school policy.

Irregardless of the soundness of such a contention it is Arkansas law that the directors of any school district may suspend any pupil for conduct that would tend to impair the discipline of the school. No school director is liable in damages for any decision or action made or taken in good faith.

In the cases at bar the Court instructed the jury that in order to find for any plaintiff against any defendant, the jury must find that he, she or it acted with malice toward the plaintiff.

The Court further stated that malice means ill will against a person—a wrongful act done intentionally without just cause or excuse. (Page 18 of Court's Instruction.) The Court also declared:

(Page 22)

You are instructed that the Mena School Board had the right to promulgate as a part of its statement of policy the declaration concerning intoxicants; and the matter of the reasonableness or unreasonableness of this declared policy is not properly in question in this case.

Furthermore, the School Board members had the right to enforce the same.

You are instructed that the teachers and school administrators had the right to enforce the school policy.

(Page 23)

In making penalty decisions concerning an alleged infraction of declared school policy such as the policy against bringing intoxicants on school premises, no teacher, administrator, school

board member or school district will be liable for any action taken or decision made if his, her or its action or decision was in good faith; and this non-liability exists even if the action or decision actually taken or made was in truth incorrect; so, if you find that any defendant acted in good faith as regards the matters at issue in this case, then your verdict will be in favor of that defendant.

(Page 25)

If you find that in fact the malt liquor "Right Time" is not and was not an intoxicant as that term is used in the declaration of Mena School policy; but you find that the plaintiffs and the school authorities in good faith considered it to be, then you are instructed that the good faith of a particular defendant in discharge of duties as a school board member or school administrator is a full and complete defense in this case as to that particular defendant.

The intelligence and quality of judgment of each of the defendants is not in issue in these cases, and

It is a well known fact that hindsight is often better than foresight, so

If you find from a preponderance of the evidence that an incorrect decision was made by any defendant in this case, the fact that the decision is incorrect or that a more sensible or more intelligent decision would have been desirable is not completely controlling, and

If you find that the particular defendant was acting in good faith, then the good faith of the defendant is a total defense in this case.

Plaintiffs have made such complaint that the Court in its instructions points out that "malice" must be proved before a

defendant in this case can be held liable in damages. Each plaintiff finds equal fault with the Court's instructions that "good faith" is a complete defense.

We point out that the real question at issue here is whether or not responsibility in damages can be assessed against either a school district, a school administrative officer or a school board member in a very narrow field and that is the field of his, her or its exercise of discretion in expelling a pupil for violation of a prescribed school policy already found acceptable by rule and order of this Court.

By its instructions the Court has said that no defendant is liable for judgment made or policies enforced in the usual and orderly conduct of school affairs if the particular defendant has decided, judged and acted in good faith, i. e., without malice toward a plaintiff.

A great deal of plaintiffs' brief has been devoted to a scholarly discussion concerning the protection of a civil right to attend school and the rules and remedies should that civil right be violated.

That is not and never has been an issue in this case.

Here, each plaintiff was enrolled in school.

Here, the school had a policy requiring suspension from attendance when a child violated the policy concerning intoxicants. A full scale hearing was conducted concerning the question of whether or not the policy adopted by the Mena school was a proper exercise of authority by that school board. This Court held that the policy was constitutionally permissible if applied equally to all pupils, which is to say, "if it is constitutionally and fairly enforced."

In the findings of the Court on March 7, 1972 there appears the following language:

"This is an application for a temporary restraining order under Rule 65 of the Federal Rules of Civil Procedure under which a temporary restraining order could be issued if there is immediate danger of, as we say, an irreparable injury or immediate injury, loss or damage, which would happen before a trial could be had on its merits. That puts the burden on Mr. Core and his clients to show such a situation. At this time we are dealing with a case where two young ladies are required to attend school and the school has passed regulations which the school has the burden of showing it had a right to promulgate. It will be the finding of this Court that **the School Board not only had the right but did promulgate a Code of Regulations,** if you want to call it that, or a manual that provided that pupils found to be guilty of any of the following shall be suspended from school on the first offense for the balance of the semester and such suspension will be noted on the permanent record of the student along with reason for suspension. Item Four under that listed the use of intoxicating beverages or possession of same at school or at a school-sponsored activity. The Court finds that **the school had the right to adopt that rule; they did adopt that rule, and the School Board had reasonable grounds to believe that that rule had been violated at the time it took its initial action in this case.** Consequently the temporary application—the application for temporary restraining order will be overruled, denied." (Emphasis added.)

We point out that the right of a school district to make reasonable rules has been plainly declared in the 8th Circuit.

In the case of Esteban v. Central Missouri State College (8th Cir. 1969) 415 F.2d 1077, Judge Blackmun (now Justice Blackmun), speaking for a divided Court, but announcing the majority opinion stated (Beginning on p. 1088):

"We agree with those courts which have held that a school has inherent authority to maintain order and to discipline students. State ex rel. Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822, 827 (1942) cert. denied, 319 U.S. 748, 63 S.Ct. 1158, 87 L.Ed. 1703; Jones v. State Bd. of Educ., 279 F.Supp. 190, 202 (M.D.Tenn.1968), aff'd 407 F.2d 834 (6 Cir. 1969); Buttny v. Smiley, 281 F.Supp. 280, 285, 286 (D.Colo.1968); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 757 (W.D.La.1968); Barker v. Hardway, supra (D.C.), 283 F. Supp. 228 at 235. We further agree that a school has latitude and discretion in its formulation of rules and regulations and of general standards of conduct. Goldberg v. Regents of University of Cal., 248 Cal.App.2d 867, 57 Cal.Rptr. 463, 472 (Ct.App. 1967); Dickey v. Alabama State Bd. of Educ., 273 F.Supp. p. 613, 618 (M.D.Ala.1967); Jones v. State Bd. of Educ., supra; Buttny v. Smiley, supra; Cornette v. Aldridge, 48 S.W.2d 935, 941 (Tex.Civ.App. 1966)."

and continuing on pages 1089-1090:

"Let there be no misunderstanding as to our precise holding. We do not hold that any college regulation, however loosely framed, is necessarily valid. We do not hold that a school has the authority to require a student to discard any constitutional right when he matriculates. We do hold that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct; that, as to these, flexibility and elbow room are to be perferred over specificity; that procedural due process must be afforded (as Judge Hunter by his first opinion here specifically required) by way of adequate notice, definite charge,

and a hearing with opportunity to present one's own side of the case and with all necessary protective measures; that school regulations are not to be measured by the standards which prevail for the criminal law and for criminal procedure; and that the court should interfere only where there is a clear case of constitutional infringement.

After all, the test, we feel, is that of reasonableness. Dickey v. Alabama State Bd. of Educ., supra, 273 F.Supp. at 618. On that standard we perceive here no denial of constitutional rights of Esteban or of Roberds. If these two plaintiffs are really serious in what is said to be their protestations of desire to complete their college education, we naturally assume that they will apply for readmission. We are mildly surprised that they have not done this as yet. We also assume, of course, that the College will view their applications, if and when they are ever submitted, with the respect and deferences to which they are entitled. Affirmed."

Here, each plaintiff admitted a violation of the policy.

The able attorney for the plaintiffs contended that there was no violation because "Right Time" was of low alcoholic content; but the expelled students and their parents did not advance such a theory. They merely contended that the penalty was too severe when applied to their child.

The Court, in its instructions pointed out that no defendant could be liable in damages except if in the expelling process, a defendant's action, was the result of "malice" toward the plaintiffs or either of them.

This freedom in the exercise of judgment is as necessary in the administration of a public school's discipline as the freedom of the judiciary is in matters that require exercise of independent judgment in courts of law. So long as the exercise of independent judgment is free of "malice" and/or is an action in good faith, there can be no action for damages.

Perhaps we should say that while each plaintiff had a right to enroll in the Mena School, neither plaintiff had a right to escape being suspended from school after a demonstrated infraction of the school rules. Each plaintiff had a civil right to enroll. Neither had a civil right to violate the rules by "spiking the punch" and each plaintiff having become an offender was subject to the school discipline of being suspended.

Damages against a school district, a school administrator or a school board member should never be permitted unless they result from a malicious motive and action.

School personnel engaged in operating a school system are, by the very nature of their work, engaged in guiding the conduct of pupils entrusted to their care. The representative system of our country has been utilized to select the school personnel for that very purpose. To discharge their required duties they must make decisions and judgments. Only if they act with malice can they be held to answer in damages. When a dissatisfied patron finds fault he must meet that high standard of proof before he can recover damages.

In the case of Freeman v. Gould Special School District of Lincoln County, Arkansas, 405 F.2d 1153 at p. 1161 (1969), cert. denied 396 U.S. 843, 90 S.Ct. 61, 24 L.Ed.2d 93, Judge Gibson used the following language:

"We do not think it within the province of the federal court to pass upon and decide the merits of all of the internal operative decisions of a school district. However, even if we were to pass upon the merits of this issue, we do not think that we could say that the Board was capricious or arbitrary in its attempt to resolve this internal dispute between the teachers and the principal of the school.

There must be some degree of harmonious cooperation in school administration to insure an efficient use of public funds and a reasonably satisfactory school program. School boards are representatives of the people, and should have wide latitude and discretion in the operation of the school district, including employment and rehiring practices. Local autonomy must be maintained to allow continued democratic control of education as a primary state function, subject only to clearly enunciated legal and constitutional restrictions."

At common law a qualified immunity was given to school authorities in matters in which the authorities are authorized to act and in which they have the right of decision.

47 Am.Jur. Schools, Section 187, p. 433 is as follows:

"Remedies for Wrongful Exclusion—Although a teacher who rightfully expels or suspends a pupil cannot be compelled to reinstate him, where school authorities maliciously, arbitrarily, or without reasonable cause expel or suspend a pupil, an injury is done which the law will redress by mandamus to compel admission or reinstatement in the school, by a mandatory injunction, or by an action for damages. Express statutory authority to suspend or expel does not alter the relative rights and duties of school authorities and pupils. Such statutes merely expressly give to the authorities the power already inherent in them and leave it subject to the same limitations.

The gist of an action for wrongful expulsion or suspension is malice; therefore, there can be no recovery where the expulsion or suspension is the result of an error by judgment by the school authorities, where they act without malice, in good faith, and in the line of what they honestly believe to be their duty. And even where a school board has acted with malice, authority exists for the view

that their actions are to be likened to those of judicial officers, who are immune from liability when acting within their jurisdiction. Unless he has sustained some direct pecuniary injury thereby it is generally held that a parent has no right to sue for damages for the unlawful expulsion or suspension of his child, since it is the child, rather than the parent, on whom the deprivation falls."

. . . . . .

The rule of qualified immunity of school authorities is stated in an annotation in 42 A.L.R. 763 as follows:

"The authorities of a school are not personally liable to a pupil for expelling or suspending him from school, when they act without malice, and in good faith, and in the line of what they honestly believe to be their duty."

In Arkansas the immunity is a qualified one by decision law and an absolute immunity by statute. In Douglass v. Campbell, 89 Ark. 254, 116 S.W. 211 (1909), the Court stated the qualified immunity of teachers and school board in the suspension and expulsion of pupils, as follows:

"It will be presumed that the teacher and the board have the best interests of the school at heart, and that they have acted in good faith in exercising the authority with which the law has clothed them. The burden is upon him who calls in question their conduct to show that they have not been actuated by proper motives. But if the teacher and board should through malice, arbitrarily and without reason, suspend a pupil from school, the pupil would have his remedy, as we have before mentioned, and the parent also would have his remedy if he has sustained any pecuniary injury by reason of such illegal suspension."

Arkansas, by statute announced the State policy as follows:

Ark.Stat. 80-1812. Directors Exempt from Liability.—

"It is hereby declared that the directors of all school districts and special school districts in this state in the discharge of their duties as such directors act in a necessary governmental function. Therefore, no action for personal injuries or damage to property arising out of the acts, conduct, or omissions of such directors in their official capacities shall hereafter be brought or maintained in this state against such directors personally."

But it is not the Arkansas statute alone which confers immunity because immunity was created by the common law and case law as well as by statutes. The Federal Courts have balanced the compelling interest of the various affected parties in school civil rights cases and have adopted the qualified immunity doctrine and have applied it to school civil rights cases.

Gouge v. Joint School District No. 1, 310 F.Supp. 984 (D.C. Wis.), involved an action by terminated teachers against members of the board of the school district for compensatory and punitive damage. This was an action under the Civil Rights Act. In his opinion Judge Doyle stated:

"Defendants contend that all of them are entitled to dismissal of the entire action on the basis of common law immunity.

(3) This contention is clearly without merit with respect to the equitable relief sought here, namely, reinstatement. The purpose of common law immunity enjoyed by the judiciary and legislature, here sought to be extended to school boards and administrators, is to preserve the integrity and independence of those bodies, and to insure that judges and legislatures will act on their free, unbiased convictions, uninfluenced by any apprehensions of consequences. Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951); Bauers v. Heisel, 361 F.2d

581 (3d Cir. 1966), cert. den. 386 U.S. 1021, 87 S.Ct. 1367, 18 L.Ed.2d 457; Kenney v. Fox, 232 F.2d 288 (6th Cir. 1956), cert. den. Kenney v. Killian, 352 U.S. 855, 77 S.Ct. 84, 1 L.Ed.2d 66.

Such considerations do not support granting immunity to school boards and administrators against actions seeking the type of equitable relief reflected in an order of reinstatement.

With respect to common law immunity from the plaintiffs' claims for damages, the situation is different. In Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), the Court held, in an action for damages only, that a policeman was excused from liability under 42 U.S.C. § 1983 when acting in good faith under a statute which he reasonably believed valid, but which was later held unconstitutional. In McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968), the Seventh Circuit applied the Pierson doctrine to an alleged factual situation somewhat similar to the present cases. In McLaughlin, two probationary teachers brought an action for damages only, under 42 U.S.C. § 1983, against the Superintendent of Cook County, Illinois, School District No. 149 and the members of the Board of Education of that District. The complaint alleged that plaintiff Steele had not been rehired and plaintiff McLaughlin had been dismissed because of their association with a union. On a motion to dismiss, in deciding the defendants' contention that they enjoyed immunity under both Illinois statute and the common law, the court stated:

"Legislators and judges have broad immunity under Section 1983 because in enacting that statute Congress did not intend to overturn their pre-existing defense. Tenney v. Brandhove, 341 U.S. 367, 376, 71 S.Ct. 783, 95 L.Ed. 1019; Pierson v. Ray, 386 U.S. 547, 554-555,

87 S.Ct. 1213, 18 L.Ed.2d 288. However, other officials, such as present defendants, retain only a qualified immunity, dependent on good faith action. Pierson v. Ray, supra, at p. 555, 87 S.Ct. 1213; . . .."

In Schreiber v. Joint School District No. 1, 335 F. Supp. 745 (D.C. Wis.), the Court stated:

"Nor is the doctrine of common law immunity an absolute bar to the granting of legal relief but rather merely a partial bar, dependent on good faith action. Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968)."

In McDonough v. Kelly et al., 329 F.Supp. 144 (D.C. N.H. 1971), in denying the claim for damages the Court applied the good faith doctrine in these words:

"There are two obstacles to the recovery of damages by the plaintiff both of his own making. The first obstacle is procedural. The plaintiff has chosen to sue the members of the School Board individually. No suit has been brought against the School District or the City of Manchester. While the very procedure of Dr. Lianos considering the plaintiff's case and voting on it without attending the hearing is shocking to one trained in the law, it does not constitute such bad faith as to render him, and the other School Board members individually, liable in damages. In fact, it must be found that even though the dismissal was constitutionally impermissible and violative of due process, it was done in good faith. See Gouge v. Joint School District, 310 F.Supp. 984, 990 (W.D. Wisc. 1970). Further, it would be unfair to make those members of the Board who voted against dismissing the plaintiff respond in damages." . . .

And in Barker v. Hardway, 283 F. Supp. 228 (D.C.West. Va. 1968) the Court stated:

"And it may be noted in passing that the law indulges the presumption that school authorities act reasonably and fairly and in good faith in exercising the authority with which it clothes them, and casts the burden on him who calls their conduct into question to show that they have not been actuated by proper motives. 47 Am. Jur.2d (Schools) Sec. 188 p. 435."

This case involves the qualified immunity for school authorities acting within the scope of their authority and in the performance of their official duties.

The Court has carefully reviewed the entire evidence in the case and finds as a matter of law no evidence from which any malice toward a plaintiff can be found or inferred. In fact no witness ever attempted to say that any defendant acted maliciously.

The close question, if there is one at all, is whether or not the school policy, as adopted and maintained, plus the enforcement thereof, created a situation from which malice could be inferred.

The Court instructed that the Board had the right to promulgate the policy concerning intoxicants and the evidence disclosed no unconstitutional enforcement of the rule, hence the combination of circumstances could not and did not justify an inference of malice.

The plaintiffs attempted to attack the good faith of the various defendants on the ground that the policy itself provided too severe a penalty for a childish prank; but in no respect was the good faith of the defendants more clearly displayed than when the President of the school board pointed out that it was the "principle" that the board was enforcing.

Furthermore, the Court instructed at page 25 of its instructions as heretofore shown that the quality of the judgment and

the intelligence of each defendant is not and was not at issue in this case. The action of a defendant would have to be a wrongful act done intentionally without just cause, and even then the good faith of a defendant is a complete defense.

Consequently, the fact that the school policy may be severe cannot be made the basis of an action unless malice is shown.

Actually, if the school patrons of Mena wanted different school directors they had and have the election process available to them—and they should always exercise their franchise with prudence because the judgment of a director is not open to question unless malice is shown.

Perhaps specific comment should be directed to the cases of the two school administrators who had no voice in making the school policy, but by virtue of their positions were required to enforce it.

And some reference should be made to the fact that a school district is by its nature incapable of malice.

But since the Court finds no evidence of malice on the part of any defendant and no circumstances or set of circumstances from which malice of any defendant can be inferred, the Court merely notes that the school administrators and the school district itself had more defenses than the other defendants, but that a verdict should be directed in favor of each and all of the defendants.

The Clerk will prepare and enter a judgment in accordance with the motion of each defendant for a directed verdict as to the claims of each plaintiff and the costs will be adjudged against the plaintiffs.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1285

JOHN P. WOOD, ED STEVENSON, RACHAEL GOFORTH, BOB PHILPOT, JIM AYLESHIRE, RAYMOND STROUD, BILL PLUNKETT, and MENA SPECIAL SCHOOL DISTRICT,
Petitioners,

vs.

PEGGY STRICKLAND, a Minor, by Mr. and Mrs. Virgil Justice, Her Parents and Next Friends; VIRGINIA CRAIN, a Minor, by Doris Crain, Her Mother and Next Friend,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

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LIST OF RELEVANT DOCKET ENTRIES

1972

Mar. 6 Complaint filed.

Motion for Preliminary Injunction, filed.

Affidavit in Support of Motion for Preliminary Injunction, filed.

Certificate by Attorney Pursuant to Rule 65(b)(2), filed.

Mar. 7 Hearing on motion for preliminary injunction Evidence presented.

Court's oral findings of fact and conclusions of law.

Order denying plaintiffs' motion for preliminary injunction filed.

Mar. 10 Answer of Defendants, filed.

Mar. 22 Plaintiffs' Interrogatories to Defendants, filed.

Mar. 23 Requests for Admissions, filed by plaintiffs.

Apr. 6 Response to Requests for Admissions filed by S. L. Inlow.

Apr. 7 Hearing on plaintiffs' motion, filed March 14, 1972, to file amendment to complaint. Plaintiffs granted leave to amend, by interlineation, their proposed amendment to complaint.

Court requests defendants to hold a School Board meeting and that plaintiffs Peggy Strickland and Virginia Crain be given an opportunity to appear and make an apology and ask to be reinstated; that a report be made to the court within one week, and

that further proceedings be postponed until after the report is filed with the court.

Apr. 10 Court Reporter's transcript of Findings of the Court, dictated into the record on March 7, 1972, filed.

Apr. 11 Plaintiffs' Interrogatories to Defendants, filed. Plaintiffs' Requests for Admissions, filed.

Apr. 13 Letter from Mr. Joe H. Hardegree, attorney for defendants, to Judge Paul X. Williams, dated 4-12-72, advising action of school board at meeting on 4-11-72 filed.

Apr. 14 Plaintiffs' Interrogatories, filed.

Apr. 21 Amendment to Complaint filed.

May 1 Separate Answer of S. L. Inlow, filed.

Separate Answer of Duddy Waller, filed.

May 10 Separate Answer of Defendants, John P. Wood, Ed Stevenson, Rachel Goforth, Bob Philpot, Jim Aleshire, Raymond Stroud, Bill Plunkett and Mena Special School District, filed.

June 2 Defendants' Answers to Requests for Admissions, filed.

June 19 Hearing on question of jurisdiction.

June 23 Answers of S. L. Inlow to interrogatories propounded by plaintiffs, filed.

Answers of S. L. Inlow to additional interrogatories propounded by plaintiffs, filed.

Defendants' Answers to Interrogatories dated April 13, 1972, filed.

July 6 Motion of Defendants S. L. Inlow and Duddy Waller for Partial Summary Judgment, filed.

Affidavit of S. L. Inlow, filed.

July 17 Response by Plaintiffs to Motion for Partial Summary Judgment by Defendants S. L. Inlow and Duddy Waller, filed.

July 21 Order overruling motion for summary judgment filed by Defendants S. L. Inlow and Duddy Waller, and further setting this case for trial to a jury on Thursday, August 17, 1972 at 9:00 a.m., or as soon thereafter as the case can be reached.

July 24 Affidavit of Peggy Strickland filed and attached to Response by Plaintiffs to Motion for Partial Summary Judgment by Defendants S. L. Inlow and Duddy Waller.

Aug. 7 Court Reporter's Transcript (Excerpts) of Hearing on March 7, 1972, filed.

Aug. 17 Trial to jury. Evidence presented by plaintiffs.

Aug. 18 Trial to jury resumes. Plaintiffs rest. Defendants motion for instructed verdict. Overruled. Evidence presented by defendants.

Aug. 19 Trial to jury resumes. Defendants rest. Rebuttal. Arguments. Instructions. Jury Deliberation.

Aug. 21 Trial to jury resumes. Further Deliberation. Jury Foreman announces jury hopelessly deadlocked. Mistrial.

Order declaring mistrial, discharging jury from further consideration of case filed.

Aug. 24 Motion for Directed Verdict and Motion for Judgment Notwithstanding Verdict or lack of Verdict, filed by Defendants Mena Special School District.

Aug. 25 Motion of Defendants S. L. Inlow and Duddy Waller for Judgment in accordance with their Motions for Directed Verdict, filed.

Sept. 8 Court Reporter's Transcript (Partial) of Proceedings of March 7, 1972 and April 7, 1972, filed.

Court Reporter's Transcript (partial) of Proceedings of March 7, 1972, filed.

Sept. 11 Response by Plaintiffs to Motions by Defendants, filed.

Sept. 29 Court's Memorandum Opinion, filed.

Order granting motion of each defendant for judgment in his favor in accordance with his motion for a directed verdict made during the trial, and dismissing complaint as to claims of each plaintiff with prejudice, defendants to recover from plaintiffs all their costs herein expended.

Order filed.

Oct. 6 Joint Motion of Plaintiffs for New Trial, filed.

Oct. 10 Brief Separate Statement in Support of Motion of Plaintiffs for New Trial, filed.

Oct. 20 Copy of letter opinion of court to counsel, filed.

Order overruling plaintiffs' motion for new trial.

Nov. 17 Plaintiffs' Notice of Appeal from Order entered September 29, 1972, and Order entered October 20, 1972, filed.

Dec. 20 Plaintiffs Description of Parts of Transcript to be included in Record and Statement of Issues, filed.

1973

Aug. 29 Opinion of United States Court of Appeals for the Eighth Circuit.

Oct. 11 Opinion and Mandate of United States Court of Appeals for the Eighth Circuit remanding cause to District Court for action consistent with Opinion, awarding attorneys fee to counsel for appellants and taxing costs against appellees, filed.

(The following matters do not appear in the Record as Docket Entries but are included herein as a summary of matters occurring since the decision of the United States Court of Appeals for the Eighth Circuit.)

Sept. 27 United States Court of Appeals for the Eighth Circuit denies Petition for Rehearing En Banc or by the Panel (see A. 10, Petition for a Writ of Certiorari).

Oct. 18 Opinion by three Judges of the Court of Appeals for the Eighth Circuit, dissenting from denial of Petition for Rehearing (see A. 11, *Ibid*)

Dec. 17 Order entered by Mr. Justice Blackmun extending time for filing the Petition for a Writ of Certiorari (see A. 14, *Ibid*)

1974

Feb. 21 Petition for a Writ of Certiorari filed.

Apr. 15 Certiorari granted.

June 13 Court Reporter's Transcript of Testimony during trial by jury, August 17-21, filed. (Docket entry).

In the United States District Court, Western District of Arkansas, Fort Smith District

Civil No. FS 72-C-11

Peggy Strickland, a Minor, by Mr. and Mrs. Virgil Justice, Her Parents and Next Friends: Virginia Crain, a Minor, by Doris Crain, Her Mother and Next Friend. Plaintiffs

v.

S. L. Inlow, Duddy Waller, John P. Wood, Ed Stevenson, Rachael Goforth, Bob Philpot, Jim Ayleshire, Raymond Stroud, Bill Plunkett and Mena Special School District, Defendants

COMPLAINT[1]

(Filed March 6, 1972)

1. The plaintiff, Peggy Strickland, is a minor and brings this action through and by her parents, Mr. and Mrs. Virgil Justice, as her next friends. The plaintiff, Virginia Crain, is a minor and brings this action by and through her mother, Doris Crain, as next friend.

2. The defendant, S. L. Inlow, is now and was at all times pertinent herein the Superintendent of Schools at Mena, Arkansas and employed as such by the Board of Education of the defendant, Mena Special School District. The defendant, Duddy Waller, is now and was at all times pertinent herein the Principal of the High School at Mena, Arkansas, employed as such by the Board of Education of Mena Special School

[1] The case title, signature lines and certificates of service are hereinafter omitted from other pleadings and orders set forth in this Appendix. All matters set forth in this Appendix involved proceedings in the District Court, except the Mandate of the United States Court of Appeals for the Eighth Circuit.

District. All other named defendants are members of the Board of Education for the Mena Special School District, presently serving and were serving at all times pertinent herein. This action is brought against the foregoing named defendants in both their individual capacities respectively and in their official capacities with the Mena Special School District respectively. The defendant School District is the political sub-division and arm of the government of the State of Arkansas charged with the responsibility of conducting the public schools for Mena Special School District in Polk County, Arkansas.

3. All parties hereto are residents of Polk County, Arkansas except Mena Special School District and it is located in Polk County, Arkansas.

4. This is a civil action seeking declaratory relief, a temporary restraining order, a preliminary and permanent injunction and equitable relief to enjoin deprivation of rights, privileges and immunities guaranteed by the Constitution of the United States of America. Jurisdiction in this court exists by reason of 28 U.S.C. 1343(3) and (4), 28 U.S.C. 2201 and 2202, and 42 U.S.C. 1981 and 1983. This action challenges as void and repugnant to said Constitution a certain rule and regulation adopted and enforced by the defendants, and certain actions taken by the defendants pursuant to such regulation.

5. On and prior to February 18, 1972, plaintiffs were duly enrolled as students in the High School in Mena, Arkansas, both in their sophomore year, and were attending said school regularly and in good standing, making passing grades and neither having ever been subjected to any disciplinary procedure before February 18, 1972.

6. At some time prior to February 18, 1972 the defendants or their predecessors had promulgated as a part of the school policy a certain rule and regulation reading as follows:

3. Suspension

* * *

b. Valid causes for suspension from school on first offense: Pupils found to be guilty of any of the following shall be suspended from school on the first offense for the balance of the semester and such suspension will be noted on the permanent record of the student along with reason for suspension.

* * *

4. The use of intoxicating beverage or possession of same at school or at a school sponsored activity.

7. On February 18, 1972 the plaintiffs were both summarily expelled from the Mena Public Schools for one week by the defendant Duddy Waller on a charge of having violated the foregoing rule.

8. Following the action of the defendant Duddy Waller in expelling the plaintiffs for one week, to-wit, on the evening of February 18, 1972, the defendant School Board summarily expelled the plaintiffs for the balance of the present semester on the same charge. The action of the School Board was taken without the plaintiffs being notified to attend, or invited to attend, or told they could attend. Rather, the defendant, Duddy Waller, told the plaintiffs, upon the occasion of his expelling them, that the School Board was to meet that evening, that he, Duddy Waller, would appear before the Board in their behalf and attempt to limit their expulsion to one week, that they could tell their parents, if they so desired, that they had been expelled, but if they did tell their parents that they had been expelled, that they should also caution their parents against contacting individual members of the Board about it. No notice whatever of the intended Board meeting was sent to the parents by the defendants and neither the plaintiffs nor their parents were invited to attend and none did attend. Following

the summary expulsion of the plaintiffs by the School Board, plaintiffs met with the defendants Inlow and Waller, with their parents present, and were told of the action of the board, that it was based on the foregoing rule, that the Board considered the rule mandatory and that they had no choice but to make the expulsion for the balance of the school term. The parents of plaintiffs requested the defendants Inlow and Waller to call another special meeting of the Board but the defendants declined to do so. The plaintiffs then employed counsel and upon their attorney's request the School Board held a special meeting on March 2, 1972 at which the plaintiffs, their parents and their attorney was present. However, the School Board merely presented a list of findings of fact, presented no witnesses to the plaintiffs, identified no witnesses for the plaintiffs, gave no information to the plaintiffs as to what had been said against them at the prior meeting, and, in fact, did nothing except to sit silently while the plaintiffs and their attorney attempted to explain and reason with the Board, following which effort the Board again reaffirmed its ruling of February 18, 1972, without explanation, expelling the plaintiffs from school for the remainder of the semester. Such action was taken on the basis of the rule above set out.

9. The plaintiffs challenge the rule as being unconstitutional in that it violates substantive and procedural due process rights guaranteed to them by the Fifth and Fourteenth Amendments to the United States Constitution. The action of the School Board pursuant to the said rule is void in that the plaintiffs, after having been led by the defendant Waller to believe that they should not attend, did not attend and have never been furnished with any opportunity to hear any witnesses against them nor to dispute such witnesses nor to explain the testimony of such witnesses but rather have wholly been denied any semblance of a hearing whatever.

10. Further, the said rule is unconstitutional and void by reason of being arbitrary, capricious, unreasonable and oppres-

sive. It purports by its terms to be mandatory and permits no exercise of discretion by any school official, it makes no allowance for extenuating circumstances in any particular case; it makes no provision for a lesser degree of punishment than expulsion for the balance of the school term, and, as applied by the Board in this case, constitutes excessive punishment and is abusive and oppressive of these plaintiffs.

11. The action of the Board in its enforcement of the rule against these plaintiffs in this case is further void in that the defendants have arbitrarily applied the rule against the plaintiffs while refusing to apply it against other students involved in the same incident, thus discriminating against these plaintiffs and denying to the plaintiffs equal protection of the laws in violation of Amendment Fourteen of the United States Constitution.

12. The said rule is void on its face as violating Amendment Fourteen by denying to persons subject to it equal protection of the laws. This results from the fact that, by its own terms, the rule is mandatory and fixes the punishment as expulsion for the balance of the semester, thus changing the mandatory punishment and providing, for the same offense, a different penalty every day of the school term.

13. The said rule and its summary enforcement by the defendants denies to these plaintiffs a fundamental right secured by the Ninth Amendment to the United States Constitution, which right is that to receive an education in the public schools provided by the State.

14. The plaintiffs were in good standing in the Mena High School prior to the foregoing action of the defendants and will suffer irreparable harm and injury if prohibited from continuing to attend high school at the Mena High School for the balance of the school term, and they have no adequate remedy at law against such harm. Their education will be retarded and

jeopardized and they will be irreparably harmed unless allowed to resume classes during the pendency of this action and unless the defendants, during such time, be restrained and enjoined from further penalizing these plaintiffs or imposing against them any sanction pursuant to the foregoing rule.

15. The defendants will suffer no harm from the granting of a temporary injunction and no bond should be required therefor.

16. The rule further provides that "such suspension will be noted on the permanent record of the student along with reason for such suspension," which provides for a permanent stigma upon each of these plaintiffs by a record made against her and prior to which she has had no opportunity to contest the accuracy of the charges upon which such record is based.

Wherefore, the Plaintiffs Pray That:

1. The court advance this case on the docket for a speedy hearing on the allegations and prayer for temporary relief;

2. That upon a temporary hearing the defendants, each and all, be temporarily enjoined from further enforcement of the foregoing rule against these plaintiffs;

3. That the plaintiffs be allowed to resume attending classes and studying at the Mena High School and be allowed to make up any school work that they may have missed by reason of their illegal suspension and barring the defendants from imposing any sanction on the plaintiffs as a result of their expulsion as aforesaid;

4. That upon final hearing the court declare the foregoing rule invalid, null and void as repugnant to the United States Constitution and make permanent the temporary injunctions; and

5. The plaintiffs recover their costs and all other relief to which they may be entitled.

(Signatures and Certificate omitted)

In the
United States District Court
Western District of Arkansas

(Title omitted in printing)

MOTION FOR PRELIMINARY INJUNCTION

(Filed March 6, 1972)

The plaintiffs move the court for a preliminary injunction enjoining the defendants, their agents, servants, employees and all persons in active concert and participation with them, pending the final hearing and determination of this action, from expelling the plaintiffs, or either of them, from Mena High School, and from interfering in any way with or preventing the attendance by the plaintiffs of classes at Mena High School, its school functions and extra curricular activities on the grounds that:

(1) Unless restrained by this court the defendants will perform the acts referred to;

(2) Such action by the defendants will result in irreparable injury, loss and damages to the plaintiffs, and each of them, as more particularly appears in the verified complaint and the affidavit of Ben Core attached hereto;

(3) The issuance of a preliminary injunction herein will not cause undue inconvenience or loss to the defendants but will prevent irreparable injury to the plaintiffs.

In the
United States District Court,
Western District of Arkansas

(Title omitted in printing)

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

(Filed March 6, 1972)

State of Arkansas }
County of Sebastian } ss.

Ben Core, being duly sworn, deposes and says:

1. He is one of the attorneys for the plaintiffs in the above entitled action.

2. This is an action for declaratory relief and equitable relief.

3. The defendants are the Superintendent of Mena Public Schools, the Principal of the Mena High School and the Members of the Board of Education of the Mena Special School District. The plaintiffs are two tenth grade students at Mena High School. The Principal first and the Board second have summarily expelled both of the plaintiffs from the Mena High School for the balance of the semester and are presently excluding them from classes and preventing their attendance as students at such school under and by virtue of a School Board Rule or Policy which the plaintiffs contend to be invalid and void and in violation of the Fifth, Ninth and Fourteenth Amendments to the United States Constitution. The summary expulsion of the plaintiffs occurred on February 18, 1972, and has caused them to this time to miss eleven (11) days of school and each day that passes is an additional day. If the enforced absence continues both plaintiffs will be caused to fail the pres-

ent school year, will be forced to fall behind their present class and finish school a year later, all to their damage, embarrassment and irreparable injury.

4. Unless the defendants are enjoined and restrained during the pendency of this action from the commission of the acts aforesaid the plaintiffs will suffer great and irreparable damage as aforesaid.

(Signature and jurat omitted)

HEARING ON MOTION FOR PRELIMINARY INJUNCTION

March 7, 1972

(Partial Transcript)

[4*] **MISS PEGGY STRICKLAND,**
after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Core

Q. State your name. A. Peggy Strickland.

Q. Peggy, if you will talk a little louder than you usually do so that we can all hear you. A. All right.

Q. How old are you? A. 16.

Q. What is your birth date including the year? A. April 6, 1955.

Q. Prior to February 18th were you a student at the Mena High School? A. Yes, sir.

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* Numbers appearing in brackets in text indicate page numbers of original stenographic transcript of testimony.

Q. How old have you been attending at Mena? A. Four years.

Q. Had you been passing your grades all right? A. Yes, sir.

Q. Never failed any grade? A. No.

Q. Were you making passing grades again this year? A. Yes, sir.

[5] Q. Do you get marks for deportment, conduct and so forth? A. Yes, sir.

Q. How are your marks in that? A. One is good, I mean one is excellent, two is good, three is average, four is failing.

Q. What sort of marks have you been getting? A. One. I stayed within the one.

Q. Have you ever been disciplined by the school authorities? A. No, sir.

Q. During your time in school? A. No, sir.

Q. Would you explain to the Court what FHA means to you and your group? A. It is an organization that the girls—you know—join in; it is the Future Homemakers of America.

Q. Is it connected with the Home Ec class in high school? A. Yes. You have to have at least one year of Home Ec to get in.

Q. Do you have some office in that organization? A. Yes, sir.

Q. What is that? A. I am a song leader and historian.

Q. When were you elected to that office? A. Last year, at the end of last year.

Q. When did you commence to serve? [6] A. This year.

Q. And you were so serving then during February of 1972? A. Yes, sir.

Q. Now, would you—let me ask the Court for a little direction here. On this temporary hearing I had not planned on go-

ing in to the merits of it, be glad to do that if the Court wants to hear it but I was thinking that the constitutional question would go more to procedure at this point than anything else.

The Court: You proceed however you want to. You will have to demonstrate about the constitutionality. Unless you can show me a federal constitution question in this matter it would not belong here, it would belong over in the state courts.

Mr. Core Continues

Q. Peggy, describe for the Court the meeting that you had planned to have of the FHA on February 7th; in other words what was it to be? A. It was to be a mother-daughter panel discussion.

Q. What time of day was it to be held? A. 3:30. Refreshments would be——

Q. Refreshments would be served at the meeting? A. Yes, sir.

[7] Q. Before the meeting? A. Yes.

Q. And the meeting was to begin at 3:30? A. Yes, sir.

Q. Was school over at that time? A. School gets out at 3:20 so we were to serve refreshments at 3:20 to 3:30.

Q. I see. So school was officially out at 3:20 p.m.? A. Yes, sir.

Q. And you were going to serve refreshments between 3:20 p.m. and 3:30 p.m.? A. Yes, sir.

Q. What part did you have in planning the refreshments for that meeting? A. Well, they started during this year the officers take turns in being the head of refreshments and it was about my turn so I just volunteered to take on the refreshments.

Q. What happened in getting the refreshments ready that day? A. Well, Sandy Thomas, she forgot the punch, her and Ginny Brown they got mixed up, so she forgot the punch and we had to get some punch.

Q. Just a minute; if you will when you give these names pronounce them distinctly so the reporter can get them. A. All right. Sandy Thomas and Ginny Brown, they were talk- [8] ing in Home Ec, I guess they got confused as to who was supposed to bring the punch, so Sandy did not bring the punch. Then we had to have some punch so I had to make some up at noon and the idea came up in English to spike it. So——

Q. OK. When is English, what period? A. That is the first period.

Q. And you say the idea to spike the punch came up during the first period? A. Yes, sir.

Q. Who all was in on that discussion? A. Me, Virginia Crain, Ginny Brown, Jo Wahl.

Q. Was anyone objecting to spiking the punch? A. No, sir.

Q. So you were all for it? A. Yes, sir.

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[9] Q. Now, then, was any further discussion had about this problem later than the first period? A. Yes, sir. In the second period——

Q. In the second period? A. Yes, sir.

Q. What course do you have during the second period? A. Geometry.

Q. Were you in on that discussion too? A. Yes, sir.

Q. Who else was in on it? A. Patty Rackley, Sandy Thomas again, Debbie Philpot, they heard about it. They were not exactly talking in on it but, you know, they heard what we told them. Patty was planning on going with us.

Q. When you say "going with us" what do you mean by that? A. Going over to Oklahoma to get it.

Q. To get whatever you was going to spike it with? A. (Shakes head in the affirmative.)

Q. Now, can you tell us whose idea it was, who suggested it to start with? A. No, because—you know—when the idea come up I just don't remember who said it, you know, just really don't.

Q. At this point you cannot say whose idea it was? A. No.

[10] Q. Do you remember whether it was your idea or not? A. No, sir.

Q. So, you was not the first one to think of it? A. No, sir.

Q. When did you go for the drink that was used to spike it with? A. The third period.

Q. Who all went? A. Virginia Crain, me, Jo Wahl.

Q. Of course, Virginia Crain is one of the plaintiffs here in this case? A. Yes, sir.

Q. Along with you? A. Yes.

Q. Now, who is Jo Wahl? A. She is a girl that goes to school with us and is a sophomore.

Q. One of the students? A. (Shakes head in the affirmative).

Q. Is she in your 10th grade class? A. Yes, sir.

Q. And she is in FHA? A. Yes, sir.

Q. Now, what happened when you went after the punch—or went after the drink? **[11]** A. Well, we took her car. What do you mean what happened?

Q. Just tell the Judge about going over there and getting the bottles? A. Well, we got in the car, we drove over there. Before we went we got the money from FHA, she gave it to us, you know, to get some punch, to set the punch up. So we drove over, she paid for it because it is a drive-through.

Q. She, who do you mean? A. Jo Wahl paid for it. It is a drive-through place. We bought it then there and then we went

down this road and we stopped there and poured it in this gallon jug the two——

Q. How many bottles did you get? A. Two.

Q. Did you know what you was going to get? A. Yes, Jo told me. I never had heard of the stuff before, you know. She said they had lime—you know.

Q. So Jo Wahl knew what to get? A. Yes, sir.

Q. Did you know what it was? A. I did not know, no, sir.

Q. When she got it did you know whether she got—had gotten it or not or what it was; did you know anything about it? A. I knew that she got it but that is all.

Q. All right. **[12]** A. We poured it in that jug and we went down to a Piggly-Wiggly—when we got back in town we went to a Piggly-Wiggly and got King Coolers, that is this lime ricky, and a package of lime koolaids, mixed it all in that jug, then we went back to school and carried the jug back and poured it all in a punch bowl; then all together it made a gallon and a half of punch with water with it and everything.

Q. But you poured the King Cooler bottles in with the two Right Time bottles before you went back to school? A. Yes, sir.

Q. How large a bottle were those King Cooler bottles? A. They were I guess ten fluid ounces I guess.

Q. Is that some sort of a soft drink? A. Yes, sir.

Q. Then you took it back to school? A. Yes, sir.

Q. And poured enough water in it to make a gallon and a half? A. (Shakes head in the affirmative).

Q. What did you do with it now between the third period and the sixth period? A. We put it in the ice box.

Q. Who helped out, now, in putting the water in it after you got back to school? **[13]** A. Virginia and I and Jo Wahl.

Q. Just the three of you who had gone after it? A. (Shakes head in the affirmative).

Q. Now, start at the sixth period and tell us what happened from there on? A. Well, we had to carry it down there, we could not carry it down the stairs in the big punch bowl so Jo took the gallon jug and poured as much of it as would go in that jug into the gallon jug and I carried that down and then she carried the punch bowl down. Then when we got down there the part that was already in there they started tasting it, the girls, you know, around started tasting it and they were saying "Oh, you can tell it is spiked," and "Oh, I don't know——"

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[14] Q. You said "the others who were there", who do you mean by "the others"? A. Patty Rackley, Sandy Thomas, Debbie Philpot and Kathy Malone.

Q. These were girls in your Home Ec class? A. Yes, sir. And Cindy Thomson, and Moppy Billingsley.

Q. Moppy who? A. Billingsley.

Q. Those are the girls that you remember being there when you and Jo carried the punch down to the meeting room? A. Yes, sir.

Q. Where were you meeting? A. In the auditorium.

Q. Was that on the first floor? A. Yes, sir.

Q. And you brought the punch down from the Home Ec room? A. Yes, sir.

Q. Which was on the second floor? A. Yes, sir.

Q. When you say you got down to the room and these other girls were in there and some of them started tasting it? A. Yes, sir.

Q. Do you know who tasted it, do you remember? A. No, I could not say; just about everybody that was there **[15]** that I named.

Q. What would they do to taste it; would they fill up a cup and drink out of the cup or drink out of the spoon or what were they doing to taste it? A. They were tasting out of the spoon and the cup, you know, both.

Q. Both of them? A. (Shakes head in the affirmative.)

Q. Were you carrying either of the containers at that time? A. The jug.

Q. Where were they getting what they were tasting? A. Out of the punch bowl.

Q. Out of the bowl? A. Yes, sir.

Q. Who was carrying the bowl? A. Jo. She set it down on the chair, that is when they—it was already set down in the chair.

Q. Jo Wahl set the punch bowl down, that is when they started tasting it? A. Yes, sir.

Q. All right, now, what happened then after that? A. Well, when they said they could taste it I got scared and I took the jug outside and all the girls were just with me, you know, like a mob going outside following me, they started screaming "don't throw that out, Peggy, don't **[16]** pitch that out." I was beside the building and Cindy Thomson grabbed the jug from me and drank out of it and then that——

Q. What was your point in going outside? A. I was going to throw it out.

Q. Why was you going to throw it out? A. That is the reason they were screaming because I was going to throw it out and they screamed "don't throw it out."

Q. When did you tell them you was going to throw it out? A. When they said they could taste it.

Q. And before you left to go do it? A. Yes, sir.

Q. Why didn't you throw it out? A. Because I really could not, there were so many around screaming—you know—that affected me too and Cindy when she grabbed it and drank out of it.

Q. At the time she had it of course you did not have a hold of it? A. No, sir.

Q. Did you ever have? A. I did at first but I let go.

Q. Did she drink out of it before you let go or after you let go? A. Well, you see, kinda both. Like I had a hold of it and **[17]** when she drank it then—or starting to drink it, I let go.

Q. Did you ever have possession of it after that? A. No, sir.

Q. Did you ever drink any of it yourself? A. When I was making it up in the Home Ec room I did but not downstairs.

Q. Not after you got it to the meeting room? A. No, sir.

Q. In other words you did not go on in to the party there and take a cup of it yourself? A. No, sir.

Q. What did Virginia do after this commotion about over pouring it out? A. Well, you know, she was going to pour it too and she told me she was going to drop the punch bowl. She picked it up off of the chair and she said she was going to drop it, you know, not drop the whole bowl but kinda pour it out but then when she was holding it like this (indicating with hands) everybody thought she was holding it to dip out and everybody started dipping out and she just set it down and me and her went on down.

Q. Did you and Virginia then have any more to do with it? A. No, sir.

Q. Did anybody seem to object to it or get tipsy or anything over it? **[18]** A. No, sir.

Q. Did you hear any more about it then for a while? A. No, I just thought it was all over.

Q. When did you hear something else about it? A. It was that Monday it happened and that week went by and up until the Thursday of the next week.

Q. So this would have been about ten days? A. Yes, sir.

Q. Do you recall whether it was on the 17th or not, a Thursday the 17th? A. It was on Thursday.

Q. What happened that day? A. Mrs. Powell called us in; we went up to Home Ec to work on our Home Ec notebooks and she was talking to Cindy Thomson and Cindy come over and she looked at me and went like that (shaking head) and I did not know what was going on, I did not think anything about it because it was over with; then Mrs. Powell said "Virginia, I want to talk to you and Peggy" and she took us over there and she asked us——

* * * * * * *

[20] Q. Go ahead. A. She took us over there and she was talking to us and she said "now, girls, do you know anything about this spiking of the punch", and me and Virginia looked at each other and we said "well, no"—you know, kinda hesitant; and she said "well, girls, if there is anything about this I will try to handle it myself if you tell me the truth and I will try to punish you myself and handle it;" so we just told her the whole truth, just come out and told her everything that happened and she said "OK, girls, I will do my best to see what I can do and don't you think right now you should not be able to go over to State Convention", and we said "yes". That was going to be our punishment not being able to go to State Convention. That was all for that day, you know.

Q. That was all you heard about it for that day? **[21]** A. Yes, sir.

Q. She was talking to you and Virginia? A. Yes, sir.

Q. Then did you hear anything further? A. Yes. The next day in the morning she had talked to Jo because she

was absent that day, you know, the day she had talked to us; so she was talking to Jo Wahl. Jo come and got me and Virginia and took us up to the Home Ec room and she told us that word was getting around and it is getting kinda loud, you know, about this and that she did not want to break her word and say—you know—be a traitor and go back on us but that if it does get to Mr. Waller without us telling him that she is just going to say "slap it to them", give them what they deserve. So we thought going down there to Mr. Waller would be the best thing and we did go down there and she, you know, asked for mercy herself, kinda pleaded our case to Mr. Waller.

Q. Mrs. Powell went with you? A. Yes, sir.

Q. How many girls went? A. Me, Virginia Crain and Jo Wahl.

Q. I believe you said that she had talked to Cindy Thomson the day before, before she talked with you? A. Yes, sir.

[22] Q. You and Virginia. Did you hear what Cindy told her? A. Cindy said she was going to expel us then and that she talked her out of it and not for me to be mad at Cindy because —she told me not to be mad at her because if it were not for her we would be out of school and I guess Mrs. Powell kinda—you know—thought she was in it like me and Virginia were or was and that is why she was talking to her.

Q. Now, then, when you went down to Mrs.—or Mr. Waller's office what happened there? A. Well, Mrs. Powell told him the whole story. He was on our side again. He wanted to do the best he could for us and he said he would try to do the best he could for us, that he would have to—he said "girls, you know what this means," he said he was going to have to take it before the Board, that he appreciated us coming in and telling him what we did and that it would have gotten around to him and then that would have been bad right there, so then that day at the last period he called us back in there and he said "now, girls, you are expelled for one week and all extra curricular

activities are cut out and you will be on probation for the rest of the year." He said "they are going to hold a Board meeting tonight and you go home and tell your parents if you want to but please, girls, don't let them get in contact with any of [23] the Board members because—you know—they don't want to be bothered, you know what I mean, they do not want to be bothered with this, with the case."

Q. Did you tell Mr. Waller—well, what did you tell him about what had happened? A. Mrs. Powell told him everything. She told what I had just said.

Q. In other words Mrs. Powell spoke for you to Mr. Waller? A. Yes, sir.

Q. And you did not tell Mr. Waller anything, she told him? A. No, sir. He asked us each one if whatever Mrs. Powell said was right and we were sincerely sorry and all this and we all said yes.

Q. Did you ask you about anyone else being involved other than you and Jo and—— A. That came up and me and Virginia and Jo said "we don't want anymore involved in this," you know, "we don't want our friends in it too." So they said OK and we dropped it right there.

Q. Now, this was the first meeting with Mr. Waller that day? A. Yes, sir.

Q. Now, about the second meeting with Mr. Waller; was Mrs. Powell present then? A. That afternoon, no, sir, she was not.

Q. Who was present besides Mr. Waller and you? [24] A. I am not sure if Mrs. Powell was there or not. Maybe she was, I just really don't remember. It was Virginia, Jo Wahl and me.

Q. Up to that time had your parents been notified? A. No, sir.

Q. And Mr. Waller told you you was expelled for one week? A. Yes, sir.

Q. And then put on probation after you came back? A. Yes, sir.

Q. And what was this about being barred from extra curricular activities? A. We could not be in—you know—like FHA, could not be in extra curricular activities, any clubs, could not go out for cheer leader or be in the Pep Club or Rancherette or any thing like that.

Q. Was that for the week you was out of school or was that for the rest of the term? A. I guess for the rest of the year.

Q. During this meeting, now, Mr. Waller told you the Board was going to meet that night? A. Yes, sir.

Q. Were you invited by Mr. Waller to attend the Board meeting? A. No, sir.

Q. Did he tell you to tell your parents to come to the Board meeting? **[25]** A. No, sir.

Q. Was any form of written notice sent by you to your parents or sent by Mr. Waller by you to your parents? A. No, sir.

Q. Did you in fact tell your parents when you got home? A. Yes, sir.

Q. Did you also tell them that Mr. Waller had said "don't contact the Board members"? A. He was going to call Mr. Waller and, you know, I thought of what he said and I said "no, daddy, he said not to contact any of the Board members" but I do guess it would have been OK if he had contacted Mr. Waller.

Q. You said "he" was going to contact Mr. Waller; who was "He"? A. My daddy.

Q. And you then told him that Mr. Waller said not to do that? A. Yes, sir.

Q. So you did not go to the Board meeting Friday night? A. No, sir.

Q. Did either of your parents go? A. No, sir.

Q. Did you have anyone there in your behalf? A. Mr. Waller and Mrs. Powell were going to speak for us, the way Mrs. Powell did for us.

Q. They told you they were going to do that? **[26]** A. Yes.

Q. What did Mr. Waller tell you in that respect? A. He said "girls, I will try my best to explain to the Board what has happened and help them be as lenient as they can on you."

Q. What did Mrs. Powell tell you that she would do? A. She was just agreeing with Mr. Waller.

Q. Now, then, have you had any report from either Mr. Waller or Mrs. Powell as to what did happen at the School Board meeting? A. Before he called—well, the next morning he called us and told us that for me to go in to school and—you know—to tell us the decision that had been made.

Q. When you said "he" you mean Mr. Waller? A. Yes, sir.

Q. He called you the next morning? A. Yes, sir.

Q. The next morning would have been Saturday? A. Yes, sir.

Q. And you were at home, were you? A. Yes, sir.

Q. And he told you what, tell us again? A. He told us to—he asked for me and he said "Peggy, I would like to see you in Mr. Enlow's office at 9:15 and you can bring your parents if you would like to."

[27] Q. When did—when he called your home did he get you or one of your parents? A. No, sir, he got my daddy.

Q. And he asked for you? A. Yes, sir.

Q. Did you go to his office? A. Yes, sir.

Q. Or, Mr. Enlow's office? A. Yes, sir.

Q. Who went with you? A. My mother, my daddy and that is all, and me.

Q. Did you meet in Mr. Enlow's office? A. Yes.

Q. Who was present besides you and your mother and daddy? A. Virginia Crain and her mother and Jo Wahl and Mr. Waller and Mrs. Powell and Mr. Enlow.

Q. Now, what happened at that meeting? A. Well, they had already decided; they just told us what the Board had decided and that we were expelled for the rest of the semester.

Q. Did anyone make any request for an opportunity to go before the Board? A. My dad asked if they could hold a special Board meeting for this and he said "no, but you can bring it up again at the next Board meeting" which was to be March 14th.

[28] Q. You said "he said"—— A. Mr. Enlow.

Q. Did he explain why the Board had taken that action? A. There was a long discussion and everything. I guess you could say he did.

Q. In other words you were there for quite a while? A. Yes, sir.

Q. Quite a bit of talk? A. Yes, sir.

Q. But the result was that you were suspended? A. Yes, sir.

Q. Have you been back since then? A. No, sir.

Q. Who all was suspended? A. Jo Wahl, Virginia Crain and me.

Q. Have you had any instructions of any kind since you have been out of school? A. Instructions to what?

Q. Any tutoring or anything of that nature? A. No, sir.

Q. Allright—— A. We went in to—I have forgotten her name—Mrs. Roberts, you know, was talking about correspondence courses and we got a slip and everything.

Q. Are you trying to stay up in your studies in case you **[29]** get back in? A. You mean about getting our home work from other people—I have tried but no, they all say "oh, well——

Q. Did Mr. Enlow say anything to you about whether you would fail being out as long as three weeks? A. He said if we were out more than three weeks we would have a bad chance of passing anyway, probably fail anyway.

Q. What kind of grades were you making? A. I was above a C average. B's and C's you would say.

Q. Of course Cindy Thomson has not been expelled has she? A. No, sir.

Q. Do you know of any disciplinary action against her? A. All the girls that were involved they got in contact with, they got in contact with those girls I named and those girls named some other girls, you know, that they knew had drank it, you know, and there is no FHA the rest of the year.

Q. In other words the FHA has been dissolved for the rest of the year? A. Yes sir.

Q. When you are cooking up there in the Home Ec department do you use such things as vanilla flavoring? A. Yes, sir.

Q. And lemon extract and things of that nature? A. Yes, sir.

Q. Do you know anything about whether or not it has alcoholic **[30]** content in that? A. I think that it does.

Q. And you use that in the food that you cook? A. Yes, sir.

Q. Do you use it when you are mixing things to drink, flavoring? A. Vanilla extract?

Q. Yes. A. No, sir.

Q. What about lemon, would you use that in flavoring? A. I don't think you would.

Q. You don't use a flavoring in the drink? A. No, sir.

Q. Just use it when you are cooking? A. Yes, sir.

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Cross-Examination

By Mr Hardegree

Q. Miss Strickland, you live out west of Mena toward the Oklahoma line, do you not? A. Yes, sir.

Q. How far west of Mena do you live? A. Eight miles.

Q. Nine miles? [31] A. Eight.

Q. How far is it on west from your home to the Oklahoma line? A. I don't know.

Q. Don't have any idea? A. No, sir.

Q. Is that the way that you took when you went out to buy this Right Times malt liquor? A. No, sir.

Q. Where did you go to buy it, the Right Times malt liquor? A. The way you go to Cove, it is called Dogpatch.

Q. In other words you go down south of Mena on Highway 71 to Cove and turn west there on another highway to go out to where they call Dogpatch in Oklahoma, is that right? A. Yes, I guess.

Q. Dogpatch is a place where several beer joints are together out on state line, isn't it? A. Yes, sir.

Q. It was just you and Jo Wahl and Virginia Crain that went out there? A. Yes, sir.

Q. I understand you went in Jo Wahl's car and she was driving? A. Yes, sir.

[32] Q. And you went to a beer joint and purchased this Right Times malt liquor? A. Yes, sir.

Q. And nobody else was with you other than the three when you purchased it? A. No, sir.

Q. You went then out in to the woods some place and transferred the malt liquor from the bottles in to a container you had with you? A. Yes, sir.

Q. Then you went back in to Mena and got some soft drinks to go with it and mix that in with it? A. That is right.

Q. And took the whole mixture on to the school premises then? A. Yes, sir.

Q. And still nobody with you other than the three of you? A. No, sir.

Q. On the school premises you took that to the refrigerator? A. Yes, sir.

Q. And then later that afternoon you took it down to the Home Ec room to be used as punch? A. Yes, sir.

Q. And until that time it was still just the three of you handling it was it not? [33] A. Yes, sir.

Q. I imagine then when you took it down to the Home Ec room for the punch, Virginia, there was a lot of giggling and whispering made about you all had put some beer or malt liquor in to it, is that right? A. Yes, sir.

Q. Some of the other girls they took your word for it that there had been some, that you had put some alcohol in to it or alcoholic beverage? A. They knew that morning we were going to do it, some of them.

Q. In other words you are saying that you all planned that and you knew in advance, you anticipated you was going to do this and the other girls knew of the fact that you were going to? A. I am not saying they were with us when we originated the idea but they did know that we were going over for it.

Q. They came to know about it? A. Yes, sir.

Q. Some of them even spoke with you to try to discourage you from doing it, didn't they? A. No, sir.

Q. Did not? A. No.

Q. You are certain of that are you? **[34]** A. Yes, sir.

Q. Then they took your word for it that when you got back that you had in fact gone over to Oklahoma and got some alcohol beverage and brought it back and put it in this punch? A. Yes, sir.

Q. And they drank some of it? A. Yes, sir.

Q. Is that the only participation that anybody else had in this other than you and Jo Wahl and Virginia Crain what I have outlined there? A. Say that again.

Q. Others heard you say you were going to get—to Oklahoma to get some alcoholic beverages to put in this punch and others heard you say when you got back that you had gone and got it and put it in this punch? A. I did not say anything about it. I wanted to keep it quiet, I did not say anything about it, that I had been nor nothing. I did not even when they said was it spiked I would just go—well (shrugging shoulders).

Q. You would just give no answer? A. No, I would not say anything. I just would (shrugging shoulders).

Q. They did not know whether there was anything in there or not? **[35]** A. They had heard.

Q. And they had been giggling and you had said no and that sort of thing? A. (Shrugs shoulders). Well——

Q. Is that the only participation of anybody else in this scheme or this plan, Peggy? A. Yes, sir.

Q. What place or beer joint did you purchase this from in Oklahoma? A. It is a drive-in. I think it is called Kay's.

Q. It is just a tavern that has a drive-in window? A. Well, yeah.

Q. They don't have a package store over there in Dogpatch, just beer taverns? A. Where you have it packed?

Q. In a store where alcohol is on the shelf? A. No, it is taverns.

Q. It is about fifteen miles down to Cove and then about five miles out to the line? A. I don't know how far it is.

Q. Takes you about a half an hour to get down there from Mena? A. Well, yes.

Q. Mena is dry, isn't it; you cannot buy any beer or whiskey or alcoholic beverage in Mena? **[36]** A. Yes, sir.

Q. Or in Polk County? A. No, sir.

* * * * * * *

Q. Now, Peggy, are you telling His Honor, the Court, that anybody forced you not to throw this out? A. They forced me to throw it out? Nobody forced me.

Q. Nobody forced you to throw it out? A. No, sir.

Q. Nobody forced you not to throw it out, did they? A. No, sir.

Q. Of course nobody forced you or kept you from going at any time during this proceeding and telling the teachers or anybody in authority that it had already gone so far you wanted it stopped, did they? A. Say that again.

Q. Did anybody stop you from going and telling the authorities what had happened? A. No, sir.

Q. At any time? A. No, sir.

Q. Well—— **[37]** A. Nobody would have the chance because when she found out about it we was right then and there so nobody had even heard it except us that was there at the time.

Q. Did Mrs. Powell influence you to say anything to her or anyone else that was untrue? A. No.

Q. Did Mr. Waller influence you to say anything that was not true? A. No, sir.

Q. Did any other person in authority at that school influence you to say something that was not true? A. No, sir.

Q. Or that was not correct? A. (Shakes head in the negative.)

Q. What you told them was the truth about the part that you had in this, wasn't it? A. Yes, sir.

Q. You did say that other girls who had knowledge about this were forced to discontinue their Home Ec activities, did you not? A. After it had come to the point where we had to tell them that is when.

Q. In other words Mrs. Powell or the school administration took some action against them, didn't they? A. Yes, sir.

[38] Q. And they have been placed on probation and on good behavior, have they not? A. I do not know about that. Might have been but I do not know.

Q. Peggy, did you know Ricky Zink? A. That got expelled?

Q. Yes. A. I heard something about it but I did not know the main facts and everything, just heard that he had got expelled.

Q. You mean to say, Peggy, that you are a sophomore? A. Yes, sir.

Q. And that is in the same high school with Ricky Zink, isn't it? A. Yes.

Q. He is back in high school now, isn't he? A. Yes.

Q. He was expelled in the fall term, wasn't he? A. Yes.

Q. Are you saying this now, you did not know what he was expelled for? A. No, I am not saying, I really don't remember. I was excited.

Q. What was he expelled for? A. Now I know, he was expelled for having liquor.

Q. In his possession on the school premises, wasn't it? **[39]** A. Yes, sir.

Q. And you knew then every single child in high school knew then that he was expelled because he did have? A. No, I cannot say every child in high school knew it.

Q. Do you know of any child that did not know about it? A. No, but it was not a big deal with me because I did not hardly know the guy myself so when he got expelled it really did not strike me as very interesting.

Q. Do you have any knowledge of anyone who has brought alcoholic beverages on the school premises, Peggy Strickland, at Mena who has not had an action taken against them by the School Board or the school authorities? A. No, sir.

Q. Peggy, do you recall the meeting of the School Board on Thursday evening, March 2nd, at Mena? A. Yes, sir.

Q. Was this School Board meeting convened after you or someone for you had asked that it be done? A. Yes, sir.

Q. And at that School Board meeting you attended with your parents and Mr. Core as attorney for you, did you not? A. Yes, sir.

Q. And wasn't there presented to you or someone for you, in other words your attorney or your parents, at that time **[40]** Peggy, a statement of facts that the Board of Directors had acted on in making the expelling expulsion? A. Yes, sir.

Q. Do you recall at that meeting that anyone requested that witnesses be presented to support those facts? A. No, sir.

Q. Did you yourself request it? A. Request what?

Q. That witnesses be presented? A. No, sir, but I heard you all were just—you know—probably have them there so there was not no need to.

Q. Did your parents or Mr. Core did you understand any of them to request that those witnesses be presented and that you be confronted with a witness? A. How is that?

Q. Did you hear your parents or Mr. Core request that these witnesses be produced there at that meeting? A. No, sir.

Q. At that meeting, Peggy, you were given a full and free opportunity to produce any evidence or statement that you wished to do so, weren't you? A. Yes, sir.

Q. Was any hindrance made to your giving your evidence or your statement? A. No, sir.

[41] Q. Well, now—— A. Hinderance, what do you mean?

Q. Did anybody deter you or try to stop you? A. Stop me?

Q. Or stop you? A. No, sir.

Q. Have you talked with Mrs. Roberts at the school after your expulsion? A. Yes, sir.

Q. Is Mrs. Roberts the school counselor? A. Yes, sir.

Q. And she is the person that is designated there to assist or counsel students with personal and school problems? A. Yes, sir.

Q. Did you talk with her about what you might do, Peggy, to get around this expulsion and to continue with your schooling? A. Yes, we talked to Mr. Waller too.

Q. Mr. Waller. Did you talk to them about correspondence courses? A. Yes, sir.

Q. Have you been told or shown, Peggy, whereby you could by taking correspondence courses finish with your class? A. Yes, sir.

Q. This coming year? [42] A. (Shakes head in the affirmative).

Q. Of course, you will be finishing, you would be finishing year after next, wouldn't you? A. Well——

Q. I don't mean finishing high school this coming year but finishing with your class? A. Graduate?

Q. Yes. A. Yes, sir.

Q. I believe that is all, Your Honor.

The Court: Anything further with this witness?

Mr. Core: Yes, sir.

Redirect Examination

By Mr. Core

Q. Peggy, Mr. Hardegree asked you about the meeting with the Board last Thursday, March 2nd? A. Yes, sir.

Q. He asked you if any request was made that any witnesses be presented against you? A. Yes, sir.

Q. I will ask if any witnesses were presented against you? A. No, sir.

Q. Was Mr. Duddy Waller even present at the meeting? A. No, sir.

Q. And was Mrs. Powell present at the meeting? [43] A. No, sir.

Q. Have you ever heard them talk to the Board about what you told them; you have never heard them talk with the Board, have you? A. No, sir.

Q. You assumed they talked there the night of February 17th but you was not present to hear it? A. No, sir.

Q. And they were not present the night of March 2nd, were they? A. No, sir.

Q. Did anybody else undertake to talk about what you had told them or what you had done on the night of March 2nd other than yourself? A. No, sir.

Q. But you did tell them that night about what you told the Court here today, did you not? A. Yes, sir.

Q. That was in response to me asking you to tell them? A. Yes, sir.

Q. Asking you questions? A. Yes, sir.

Q. Did any of them ask you any questions? A. No, sir.

Q. Did any of them explain to you why they had done what [44] they had done? A. No, sir.

Q. Of course, at that time you had already been expelled, hadn't you? A. Yes, sir.

Q. Did you ever appear before the Board before you were suspended? A. No, sir.

Q. Now, with reference to Mrs. Powell, her influencing you to tell something that was not true or not to tell something, did what she promised you influence you to tell her the truth? A. Yes, sir.

Q. And you went ahead and told her what had happened because she promised you she would handle it? A. Yes, sir.

Q. Then why were you all influenced to go down and see Mr. Waller? A. Because she told us word was getting around and was getting real loud around the school and that Mr. Waller would probably find out anyway and her job would be on the line and she would just tell him to give us what we deserved.

Q. And you went with her then still in the hope of getting some leniency? [45] A. Yes, sir.

Q. And you heard her talk to Mr. Waller? A. Yes, sir.

Q. And you went to him in the hope of leniency? A. Yes, sir.

Q. And was that the reason that you went hoping for leniency? A. Yes, sir.

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[46] Mr. Hardegree: By stipulation of counsel could we—correct me if I am wrong—by stipulation of counsel Defendants' Exhibit No. 1 is introduced as the facts and findings of facts upon which the School Board had acted and which were presented to the petitioners at the School Board meeting on the night of Thursday, March 2?

Mr. Core: So stipulated. (See A. 137).

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[48] **MISS VIRGINIA CRAIN,**
after first being duly sworn, testified as follows:

Direct Examination

By Mr. Core

Q. Will you state your name, please? A. Virginia Crain.

Q. Virginia, if you will just speak a little louder so all can hear you. When were you born? A. October 29, 1955.

Q. Were you a student at Mena High School prior to February 18, 1972? A. Yes, sir.

Q. What grade were you in? A. 10th.

Q. Were you also a member of the same class that Peggy has been testifying to or about this morning, the Home Ec Class? A. Yes, sir.

Q. Are you also an FHA? A. Yes, sir.

Q. And did you hold an office in FHA? [49] A. Yes, sir.

Q. What was that? A. Secretary.

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Q. Now, Virginia, you have heard Peggy, of course, already testify about the plans that were made for spiking the punch there on February 7th and the part she played in it and that you played in it and that others played in it, so I will not ask you to repeat that unless there is some part of it that you feel that should be changed. Do you think Peggy told it about like it was? A. Yes. There was one incident she might have known. Cindy told me the reason Mrs. Powell come to her, Peggy thought maybe it was just because she thought maybe Cindy was in on it but Cindy told us it was because Cindy was a good Christian and everything thought maybe she would tell the truth so she came to Cindy to ask, that is what Cindy said.

Q. That is what Cindy said was the reason that Mrs. Powell talked to her? A. Yes.

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[50] Q. I want to ask you to back up a little, Virginia. Do you have any brothers and sisters who attend school at Mena? A. Yes, sir.

Q. Who are they? A. My little brothers and sisters?

Q. Do you have anyone else in high school? A. Yes, my sister is a senior, Norma Crain.

Q. She is a senior in the Mena High School? A. Yes, sir.

Q. I want to ask you this, have you prior to February 17th, 1972, ever had any disciplinary proceedings taken against you by the Mena School? A. No, sir.

Q. In other words you have never been in trouble before in school? A. No, sir.

Q. Were you passing your grades there in February 17th, **[51]** 1972? A. Yes, sir.

Q. What courses were you taking? A. English Three, Geometry, World History, Home Ec and Band.

Q. And you were passing all of these courses? A. Yes, sir.

Q. And what about your conduct grades? A. I made a One also.

Q. You always made a One? A. I think I made a One all the time.

Q. Is that the highest you can make? A. Yes, sir.

Q. Now, with reference to the type of beverage that was bought over there in Oklahoma, did you know anything about what to buy? A. No, sir, I had heard of it but I had never tasted it.

Q. Ever bought anything before like that? A. No, sir.

Q. Ever even been in a liquor store? A. No, sir.

Q. Do you know anything about liquor? A. No, sir.

Q. Who decided what to order when you drove up to the window? A. Well, I don't know. Jo just ordered.

Q. Jo Wahl ordered the drinks? **[52]** A. Yes.

Q. Had you ever seen anything like it before? A. No, sir.

Q. And you heard of course Peggy testify about the fact that you bought two bottles, is that the way you remember it? A. Yes, sir.

Q. And that you poured it in a milk carton and threw the bottles away? A. Yes, sir.

Q. Did that happen before you came back to Mena? A. Yes, sir.

Q. So you came back with the contents of the two bottles in a milk carton? A. Yes, sir.

Q. And you went to the Piggly Wiggly store and bought six bottles of some soft drink? A. Yes, sir.

Q. Now, let's go to the occasion of bringing the punch down to the meeting room; did you take part in that? A. No, sir.

Q. Were you in the meeting room when Peggy and Virginia came in with the punch? A. Yes, sir.

Q. What happened there? A. When I came in there the punch bowl was setting in a **[53]** chair where Jo had set it down I guess, I don't know who brought it down, Jo she said; it was setting in the chair and then I went up there where all the refreshments were being served and then three girls, Patty Rackley, Cindy Thomson and Debbie Philpot, they tasted of the punch to see if you could taste it in there and they said they could taste it. So that is when me and Peggy got scared and I got the punch bowl and she grabbed the—she already had the milk jug, it was in there and that is where we attempted to spill it.

Q. You intended to spill it out of the bowl? A. Yes, sir.

Q. Or just going to pour it there on the floor? A. I was just going to do anything with it, spill it or drop it.

Q. You had you had in mind even dropping the bowl and breaking it? A. Well, I was scared.

Q. In other words you wanted to get rid of the punch? A. Yes, sir.

Q. Now, what did you do after the girls started taking it out of the bowl; did they do that while you was a holding it? A. Yes, sir. They got a little spoon and started getting it in their cups. So I did not want them to think I was just sitting there for them so I got scared, they took it and they started pouring their glasses and I just set **[54]** it down there and I went with Peggy. We hid behind the wall.

Q. You say you hid behind the wall; what wall? A. There is a wall in the auditorium between the door and the chairs and we hid behind this wall.

Q. Did you have anything more to do with the punch after that then? A. No, sir.

Q. Now, you heard Peggy testify that she did not hear anything about it after that until about the 17th of February; is that true? As far as you know? A. Yes, sir.

Q. Then on that date you talked to Mrs. Curtis Powell? A. Yes, sir.

Q. Did you first deny any knowledge or any participation in spiking the punch to her? A. Yes, sir.

Q. But you then later changed your mind and agreed to tell her? A. Yes, sir.

Q. Your part in it? A. (Shakes head in the affirmative).

Q. Were you influenced any to do this by what she promised you? A. (Shakes head in the affirmative).

Q. You will have to answer yes or no, the Court Reporter can not get it by just nodding your head. **[55]** A. Yes, sir.

Q. In what way, Virginia? A. She said that if we told her she would try to keep it in herself and not let it get out around to the principal or anything, she would try to keep it in, but if later the principal found out she was just going to tell him to give us what we deserve.

Q. So you told her then hoping that the punishment that she decided on would be all that you would get? A. (Shakes head in the affirmative).

Q. What did she tell you was going to be the punishment? A. She told us we were not going to the State Meeting at Little Rock, FHA meeting, would be our punishment.

Q. What is that? A. Well, all the officers get to go and we elect some of the girls that we think have worked hard this year and then they get to go and we go to the zoo and go

shopping and go to a meeting. Everyone always looks forward to the meeting.

Q. Is it sort of a highlight of the year for the FHA? A. Yes, sir.

Q. This is a trip to Little Rock, is that what it is? A. Yes, sir.

Q. For how many days or nights? A. The whole day.

[56] Q. One day? A. Yes, sir.

Q. And your punishment according to Mrs. Powell that you would miss that trip? A. Yes, sir.

Q. Now, what about the next day when Mrs. Powell talked to you again and you went down to see Mr. Waller; what influenced you to go down there to see him? A. She said that if we tried to just take it on ourselves and let her handle she was afraid it might get out so she asked us if we would want to go down and tell Mr. Waller and we did. She said she would plead and ask for mercy, that he might—you know—she said she was sure he would level with us, he would understand. So we did go with her.

Q. You went down there in the hopes that he would be lenient with you? A. Yes, sir.

Q. Now, you heard of course Peggy's testimony from that point on; is there anything you want to add to that? A. No, sir.

Q. You were in on the interviews with Mr. Enlow and Mr. Waller and that was in Mr. Enlow's office on Saturday morning? A. Yes, sir.

[57] Q. Had you at any time been invited to attend the Board meeting on Friday night? A. No, sir.

Q. Were you told by anyone that you could attend? A. No, sir.

Q. Did you attend? A. No, sir.

Q. Was any notice sent by you or in any other manner to your mother that she could attend the Board meeting? A. No, sir.

Q. Did you tell your mother on February 17th, after you had been to Mr. Waller's office the second time, did you tell your mother that there was going to be a Board meeting? A. Yes, sir.

Q. And was this the first your mother knew that you had been suspended for a week? A. Yes, sir.

Q. You had not told her anything before that? A. No, sir.

Q. She had not been notified by the school authorities? A. No, sir.

Q. What did Mr. Waller tell you about that meeting that was going to be held Friday night? A. He said as of now we are suspended for one week and no activities and no state convention, he said that there [58] would be a meeting tonight on that Friday and he would call us after the meeting if it was not too late or the next morning. He said then we would know then what our punishment would be.

Q. Did he say anything about what he was going to tell the Board, what he was going to recommend? A. He said him and Mrs. Powell would do the best to help us and tell everything and ask for mercy.

Q. Did he say anything about whether or not you should attend or your parents should attend? A. No, sir, he did not say anything about that.

Q. What about if anything was said about contacting the Board members? A. He said to tell our parents not to try to contact them, the Board members.

Q. Did you tell your mother that? A. Yes, sir.

Q. And you did not of course attend the Board meeting? A. No, sir.

Q. Did you have a call the next day from Mr. Waller? A. Yes, sir.

Q. Who did he talk to at your house? A. I answered the phone and I talked to him.

Q. So you took the call yourself? A. Yes, sir.

[59] Q. What did he tell you? A. He told me—he asked me if I could come down to Mr. Enlow's office, bring my mother if I could. He asked me something about bringing my mother.

Q. Did you go to his office? A. Yes, sir.

Q. Can you tell us who was present? A. Mr. Enlow, Mr. Waller, Peggy, Mr. Justice and Mrs. Justice, and Jo Wahl and my mother.

Q. Now, about the meeting of March 2nd, you heard Peggy tell about that too; do you want to add anything to it? A. No, sir.

Q. Of course you was present the night of March 2nd when we met the School Board down there? A. Yes, sir.

Q. Have you ever at any time heard any witness tell the School Board anything about this or tell the School Board anything about what you have said to that witness? A. No, sir.

Q. The only time you have ever been before the Board of course was March 2nd, isn't that right? A. Yes, sir.

Q. And about the only people that talked that night was Peggy Strickland and myself and yourself, isn't that right? **[60]** A. Yes, sir.

Q. Was Mr. Waller present that night? A. No, sir.

Q. Was Mrs. Powell present that night? A. No, sir.

Q. Were any of these other girls that were involved were they present that night? A. Yes, sir, one.

Q. Who was there? A. Jenny Brown.

Q. Did Jenny Brown say anything? A. No, sir.

Q. Was she asked anything? A. No, sir.

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Cross-Examination

By Mr. Hardegree

Q. Virginia, did I understand you was expelled a week before your mother knew about it? A. No, sir.

Q. You did not say that? A. No, sir.

Q. All right, in your statement and testimony and in your corroboration of what Peggy said I assume that there was **[61]** no person involved with you and Peggy and Jo Wahl in going after this alcoholic beverage? A. No, sir.

Q. No one involved with you in bringing it on to the school grounds or campus? A. No, sir.

Q. And no one involved with you in bringing it down and making it available as punch or refreshments or beverage to be taken at the function, is that right? A. That is right.

Q. Have you throughout all of this, Peggy, told anything to any of the people in authority at the school that is incorrect or wrong? A. I have not.

Q. Have not? A. I have not.

Q. Have you talked with Mrs. Roberts, the counselor at the school? A. Yes, sir.

Q. Has she pointed out to you the way in which you can go ahead and complete school with your class? A. Yes, sir.

Q. Do you know of any other case, Virginia, where someone has brought intoxicants on to the school premises that has not

been dealt with by the School Board or school [62] authorities? A. I did not know up until this that Ricky had.

Q. Did not know at this time or until this time that Rickey had? A. Yes, sir.

Q. Have you inquired since this happened about what happened to Rickey? A. Yes, sir.

Q. When you say you did not know it until this time about what had happened to Rickey you are talking about Rickey Zink, aren't you? A. Yes.

Q. And after this thing happened to you did you make some inquiry about Rickey Zink? A. Sir?

Q. How did you find out about Rickey Zink? A. Well, a big talk about Rickey when he got expelled for drinking stuff. I did not know, I knew that Rinky got expelled but I did not know what for.

Q. Did not know the details of it? A. No, sir.

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[64] **MISS PEGGY STRICKLAND,** Recalled

Direct Examination

By Mr. Core

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Q. I am holding in my hand a little green bottle; it says "Right Times Flavored Malt Liquor." Is that the type of bottle that you girls got over there in Oklahoma? A. Yes, sir.

Q. Was it this size of bottle? A. Yes, sir.

Q. Like to offer it as Plaintiffs Exhibit No. 3.

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The Court: Let it be introduced.

Mr. Core Continues

Q. For the Court's information I will read this later but the label says—well, on the top it has got a seal that says "Oklahoma," then down here "Gold, slightly tart, a new kind of adult beverage, Right Times, flavored malt liquor, Theodore Hamm Company, St. Paul, Minn., with artificial flavors, twelve fluid ounces."

The Court: Does it tell how much alcohol in it?

[65] Mr. Core: It does not.

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[66] **MISS VIRGINIA CRAIN,** Recalled

Direct Examination

By Mr. Core

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Q. Virginia, after you had been to Mr. Waller's office the second time on Friday the 17th of February when school was out did you go home? A. Yes, sir.

Q. Did you know about there being a ball game or something that night? A. Yes, sir.

Q. Did you go to the ball game? A. No, sir.

Q. Where did you stay that night? A. Home, stayed home.

Q. At your home? A. Yes, sir.

Q. And were you home say from, oh, six or seven o'clock in the evening for the rest of the night? A. Yes, sir.

Q. You did not attend that ball game? A. No, sir.

Q. Thank you.

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[4] **MR. P. T. WALLER,**
after first being duly sworn, testified as follows:

Cross-Examination, by Mr. Core

Q. Mr. Waller, how long have you been in the educational field? A. Since 1951.

Q. Do you consider expulsion a severe type of discipline? A. I would say this as I have stated before I believe the amount of punishment that would be due to serve the purpose [5] and we have had many problems in the Mena High School since I have been there, sir, and I have only been there one year.

Q. How long have you been there? A. One year.

Q. How many children have you expelled since you have been there? A. Five boys, five people have been expelled and I think it has helped our discipline tremendously, and I feel that under the circumstances that an expulsion if there is any way to get around it, fine, but we have got the overall discipline to think about and that is why we have the Board of Education, they make that decision, but I think or feel an expulsion in the other cases where we expelled children was definitely necessary.

Q. Without arguing that would you consider it a severe type of penalty? A. I would think yes, sir, it is severe, but I feel like it needs to be severe.

Q. In some cases or do you think it needs to be severe in every case? A. In cases where we have policies and where we have for alcoholic beverages as we have at Mena and as it has been used when alcoholic beverages is used, of course it is up to the Board there, I have no say, but I do not have any [6] use for alcohol. I do not believe it can be used in schools and discipline be maintained.

Q. I understand that you told the girls that you were going to go before the Board and do all you could to get them off with

a week's suspension? A. No, sir, I did not say that, no, sir, not with a week's suspension. I told them that I would plead to the Board to do whatever they needed to do and if they could do anything to help them finish their education then I would do it.

Q. So you did not tell them that you were going to try to get them off with a week's suspension? A. No, sir. No, sir.

Q. Now, you made some recommendations to the Board I believe you said? A. I sure did.

Q. You had just completed your recommendation when the telephone call came in? A. Yes, sir.

Q. And was that recommendation that they be suspended for the rest of the semester? A. No, sir, I told the Board that they had a job to do and all I was asking is for leniency; I made no recommendation as to what they should do because that is their job. All I wanted to do was the girls that they really feel the [7] girls were sorry and I think I need to put this in—I talked with those three girls and each one says that they were real sorry that they had done what they had done and that they would never do it again, then when the call came in I did not know which girl but here is my thinking, if one has already gone against what I asked them not to do—and I made this statement—for God's sake, girls, don't let us down, we are going to bat for you, don't let us down. Less than three hours one had let us down. Now, I did not know which one but I felt if one had, how was I to know the other two would not, so I withdrew my recommendation. I said "Board, do whatever you feel you have to do." I washed my hands of it after Mrs. Powell said she did.

Q. Thank you. Now, you have since learned of course, I hope, that Virginia and Peggy were not involved in the telephone call, have you not? A. Yes, sir.

Q. Now, then, you still feel they should be punished just as severely as the one who was involved? A. Sir, I don't think my feelings has that much to do with it now.

Q. I am just asking if you had known at the time that you were making your recommendations there, if you had known **[8]** it was Jo Wall only, that the other two children were home in bed or home crying about what had happened, if you had known that would you have gone ahead with your recommendations to the Board? A. I do not know that.

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Q. Now, then, Mr. Waller, when these three girls came to you with Mrs. Powell and you got your first information of this problem and I assume that was your first information? **[9]** A. Yes, sir, it was.

Q. Did you make any effort to find out what type of beverage it was that these children had bought? A. Sir, if it was alcoholic beverage which they said and one of the girls stated it was twenty percent alcohol then I thought that was proof enough and that is what I made my decision on.

Q. So you based your decision on what these three fifteen year old girls told you about the contents of a bottle of alcohol or a drink? A. Yes, sir, I did. If they knowingly tell me they came on campus with the intent of putting it in the punch and it is twenty percent alcohol and they said it was malt liquor then I felt that was enough because I had a boy who came on with beer and I expelled him.

Q. Were you assuming after you talked with these three girls that the drink that they had served there was twenty percent alcohol? A. That is what they said.

Q. And that is what you acted upon, of course, that is the only information you had, isn't that right? A. Yes, sir. That is all the information I had is what the three girls had said plus what Mrs. Powell had said.

Q. Is that what you told the Board when you went before them? A. Sir, as I said a moment ago, I told the Board, the Board **[10]** had the facts of what Mrs. Powell said, all I did was make the recommendation as has been stated before. Mrs. Powell gave the presentation.

Q. Were you present when she gave the presentation? A. Yes, sir.

Q. Did she undertake to tell the Board what type of drink it was the girls had bought? A. Sir, the thing that I was—the only thing that was in my mind and hers too it was an alcoholic beverage, it does not say in the policy what percent of alcohol it has to be; that is what I was going on that it was an alcoholic beverage.

Q. You were basing that of course, as you said, on what the girls had told you? A. Yes, sir.

Q. Or what one of the girls had told you? A. All three girls.

Q. Did all three—— A. All three said it was an alcoholic beverage, yes, sir.

Q. Did all three of them tell you it was twenty percent alcohol? A. No, sir.

Q. How many told you that? A. One.

Q. Do you know which one? **[11]** A. Yes, sir, I know which one.

Q. Who was it? A. Jo Wall.

Q. What did Mrs. Powell tell the Board about the alcoholic content of the beverage? A. Sir, she just said it was an alcoholic beverage which had been put in the punch.

Q. I see, she did not undertake to tell the Board what percentage of alcohol? A. As far as I know no she did not say the percent of the alcohol.

Q. Did any other witness appear before the Board other than you and Mrs. Powell? A. No, sir.

Q. So the only information that the Board got at this meeting was what you and Mrs. Powell gave them? A. Yes, sir.

Q. And as far as you know they made no inquiry of anyone else at the meeting as to what "Right Times" contains in the way of alcohol; was there any other person there that they asked somebody out in the audience what the—or how much alcohol is in this drink? A. No, sir.

Q. Of course they did not have a bottle of it there, did they? **[12]** A. No, sir.

Q. Did not send out for a bottle either? A. No, sir.

Q. Of course neither of the children were there? A. No, sir.

Q. None of their parents were there? A. No, sir.

Q. Had not been invited, had they? A. The girls were told the Board meetings were always open and I told them that if the parents wanted to come to the Board they were welcome to come to the Board, that all Board meetings is always open. This was told those girls that afternoon.

Q. Did you call the parents and tell them? A. No, sir, I did not call the parents and tell them because I did not know we were having a Board meeting, we got it arranged, I imagine, about 6:30 or 7:00 and the reason I worked to get the Board together was so they could act Friday night so that if they did show leniency in any way that the girls could be back in school on Monday.

Q. You were trying to do the girls a favor? A. I was doing my best to, yes, sir.

Q. How did you get them together, the Board; did you call them? **[13]** A. Mr. Enlow and I both called the members, I went to see I believe it was three members.

Q. And you got it all arranged about what time? A. I would imagine around—I am not real sure but I would say probably 5:30 to 6:00 or maybe 6:30, I don't know exactly what time.

Q. When did they get together? A. 9:30.

Q. Did you notify the press? A. Yes, sir, we sure did.

Q. Any member of the press there? A. No, sir.

Q. But you did not notify these parents? A. No, sir.

Q. You said—— A. At this time may I make this statement?

Q. Sure. A. At this time I did not know what or whether the girls had even told their parents or not, Mr. Core, because those girls said "what are my parents going to do if I tell them" and I said "girls, that is up to you as to whether you tell them or not".

Q. You did not think it was incumbent upon you as a school administrator to tell those parents yourself? **[14]** A. If I take those children in my confidence in going to help them and they beg me or they tell me and each child asks me "Mr. Waller, will you not say anything at all about this" and as far as them saying something about calling the Board or asking that I not call the Board—which I would like to bring out that point if I may.

Q. Sure. A. Is that I did not tell them they could not call the Board but I said "girls, I am going to go to bat and do the best I can for you; if you call the Board what are you going to say, that I went over into Oklahoma"—and at that time it had not been established as far as I am concerned because they had told this that day, I did not know they had gone to Oklahoma the day of the meeting to get the liquor, is they said they had stashed it away on probably a previous trip to Oklahoma and it had not been established in my mind that they had gone to Oklahoma; so I asked them "what are you going to tell

the Board if you call them, that you have put liquor into the punch or an alcoholic beverage into the punch, what else can you tell them, I will do the best I can to help you", and that was my part. I did not tell them they could not call the Board members but they asked me "what should we do, how can we help, what can we do", **[15]** and so help me I was doing everything that I could to help the girls and I advised them along that line.

Q. Now, let's get on to another point then. You said a while ago that you told the parents that this suspension was automatic. I may be mis-quoting you, you used the term that the suspension was automatic? A. I did what I had to do on Friday afternoon which I expelled them because they had been on campus with an alcoholic beverage and put it in to the punch so according for me to carry out my job, the policies that we have to operate on, I have to follow them.

Q. You understand the rule to be this suspension is automatic? A. As far as I am concerned the suspension is automatic, yes, sir.

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Q. Now, Mr. Waller, you have told us on disciplinary action which you have taken against the whole class, the whole Home Ec class; you have cancelled their activities for the rest of the year I believe you said? A. Yes, sir.

[16] Q. And you put some of the other children on probation I believe you said? A. Yes, sir, not probation—just a period of good behavior.

Q. What is the difference? A. Probation goes on the permanent record and good behavior does not.

Q. OK, so you have got some of them on good behavior? A. Yes, sir.

Q. Why did you do that? A. Because I felt that these girls they could have gone to Mrs. Powell and told her which they

did not that they suspected there was alcoholic beverage in the punch and they did not go forward and tell you; this whole thing could have been stopped and made lesser, that is the reason I did what I did to all because from what so **[17]** many said I could not say for sure that everyone did not hear or in some way know by hearing some one else say that some one spiked the punch. I felt everyone, every member there had possibly heard the rumor to the effect that possibly there was alcoholic beverage in the punch.

Q. Didn't you get information from some of them that they actually drank the punch? A. Yes, sir.

Q. After they found out that it was spiked? A. Yes, sir. That they heard that it was in there and they did not see anyone put it in, they could not swear that it was in. They had heard.

Q. You never saw anybody put it in there either, did you? A. No, sir.

Q. But you believed it was in there? A. I could not definitely say it was in there, no, sir.

Q. But you expelled three girls because it was in there so didn't you believe it was in there? A. I expelled them on their confession.

Q. You believed it, didn't you? A. Yes, sir, I had to believe that. I had their word that they said they did.

Q. These girls that had heard it and believed it and drank it, now, why didn't you expel them? **[18]** A. Because I thought it was different from the standpoint is I have been at parties myself and someone would say the punch is spiked, do you always believe it? Not me, not always. Then some of the girls more or less just thought it was a joke and too, how are you going to distinguish, I questioned about thirty girls and I found that one girl was brought in to be questioned who was not even at the party and when you question a fifteen or sixteen year old

girl in many instances things come out that may not be true in every case and I am not saying anyone has told a story but I know this—that one girl was brought in who another said she knew or had heard that the punch had been spiked——

Q. Is there any of those thirty tell you that they had drank it? A. Yes, sir.

Q. After they heard it was in there? A. Yes, sir.

Q. Did you believe them? A. Yes, sir, I did.

Q. Why didn't you expel them? A. Because I thought it was of a different nature from the standpoint they did not know definitely it was in there.

Q. You said the rule is automatic? A. I say——

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[20] Q. You notice that your rule says "possession or use"? A. That is right.

Q. Now, then—— A. I would say this, that the girls did not see, they did not know definitely any alcohol was in there.

Q. They told you they did? A. No.

Q. They told you they believed it was in there? A. They did not definitely see the girls put it in there. I said "girls, are you sure that alcohol was in the punch"? "No, sir, we are not sure, we were told" and they said "everybody was saying alcohol was in the punch". I said "did you see the alcohol put in the punch"? "No, sir." **[21]** So how else could they know alcohol was in the punch? They did not see it and I determined it differently from the three girls who knowingly put it in the punch and that is how I made the judgment and I stand on it.

Q. I think we see how you made your judgment, that you based it on what the three girls told you and you believe what they told you, and then—— A. These three girls——

Q. You did not expel anyone else because you did not believe that they knew it was in there or else you feel like that even though they believed the three girls and believed it was in there that you ought not to expel them when in fact it was in there? A. By what Mrs. Powell said and these three girls and them testifying that "we did put it in there knowingly" is differently than hearing that it was in there in the drink.

Q. All right, now, then, of course do you know up to this day what the alcoholic content of that bottle right there on the Clerk's desk is? A. To me I do not know, no, sir.

Q. Then you have not made any effort to find out, have you? A. All I know is it is an alcoholic beverage.

Q. Do you know that? A. As you read it it was and as the girls said it was an **[22]** alcoholic beverage, why else would they go to a beer joint, all the way over there, if they were not going to get an alcoholic beverage; that was their intent and they said it was alcoholic.

Q. I am asking you; you was talking a while ago about what these girls knew that drank the beverage. You said you did not expel them because you did not feel like they knew. Now, then, I want to ask you if you know; have you ever known what that drink actually contains? A. No, sir.

Q. All right, now, then, not knowing of course you could not know how much alcohol was in a gallon and a half of water after two of those bottles were poured in it, would you? A. No, sir. But I know there would be alcohol in an alcoholic beverage.

Q. Are you sure not knowing whether there was any in that bottle? A. No, sir, I could not be definitely sure but I took the girls' word for it. The girls said it was and if they admitted it was that is good enough for me.

Q. And you expelled them as alcoholic experts, didn't you? A. Sir?

Q. You treated them as though they knew all about what was in that bottle and expelled them on what they told you, **[23]** didn't you? A. I expelled them on what they said, yes, sir. I sure did.

Q. Now, then, I want to ask you about a meeting of the School Board on March 2nd, Thursday night of last week; where were you Thursday night of last week? A. I was in the building.

Q. Why didn't you come to the meeting? A. Because I was right in my office there, if they needed me—I told them that if they needed me, I asked Mr. Enlow if I should go and the attorney asked him if I should go and they said "if we need you we will call you", so I worked in my office about ten yards from where the meeting was being held. They could have got me at any time.

Q. But you never did come in the meeting? A. No, sir.

Q. And the reason of course was you was not asked to come in? A. No, sir, I was not asked.

Q. Well—— A. But I was available.

Q. Did you see me while I was there? A. No, sir.

Q. For the record I did not see him, Your Honor, and did not know he was in the building. Now, of course, not **[24]** attending the meeting you do not know whether Mrs. Powell was there or not? A. Yes, Mrs. Powell was definitely there.

Q. She was there? How do you know that? A. She was working in her room.

Q. She was in the building too? A. Yes and was available.

Q. Do you know why she did not come to the meeting? A. No, sir.

Q. You don't know when this rule was adopted; it was adopted before you came there? A. Yes.

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Redirect Examination, by Mr. Hardegree

Q. Mr. Waller, did anybody make any request of you to be at the meeting on that occasion? A. No, sir.

Q. Mr. Core did he get in touch with you to make any such request? A. No, sir.

Q. On the occasion of the meeting itself, did you have any information that you was asked for that your presence was required or requested? A. No, sir.

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[26] **MR. S. L. ENLOW,**
after first being duly sworn, testified as follows:

Cross-Examination, by Mr. Core

Q. Mr. Enlow, how long did you say you had been at Mena? A. Six years or will be, this is my sixth year as superintendent.

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Q. How many students have been expelled at Mena since you have been there? A. Mr. Core, I am not positive. There are five students that have been suspended or expelled this year, there have been others, just how many I am not sure.

Q. Are all of these expulsions for the balance of the school term every time? **[28]** A. There have been some suspended that were for less than the school term, yes, sir.

Q. During your time at Mena how many have been expelled for the balance of the school term? A. I am still not sure how many were; five during this school term not counting the three girls in question, and there have been others but just how many I am not for sure.

Q. You were superintendent during that time, weren't you? A. Yes, sir.

Q. You knew about each case? A. Yes, sir.

Q. Would you say there has been as many as six others during your seven years? A. Perhaps, more or less. I still do not know the exact number.

Q. Would you say there has been as many as a dozen? A. I would not think so.

Q. There has been less than a dozen? A. I think so.

Q. That is over a period of seven years? A. Six years.

Q. So we have an average of at least less than two per year on that basis, that is just ordinary mathematics? A. (No answer).

[29] Q. With reference to the meetings that the Board has, are you the official that gives the notice to the newspaper and the radio? A. Yes, sir.

Q. Do you also get the notice out to the Board members? A. Yes, sir.

Q. So you are more or less the secretary in charge of giving notice that you are going to have a Board meeting? A. That is true. Just a reminder, it is standard, the regular meetings are standard, they are on the calendar.

Q. On the occasion of the Board meeting the night of February 18th, did you notify any of these parents that the Board was meeting that night? A. I did not.

Q. You do have available to you I am assuming, Mr. Enlow, in the school records the telephone numbers of the parents? A. They were available to the principal.

Q. No problem about calling them if you intended to? A. No more trouble than any other phone call I would not imagine.

Q. On the occasion of the meeting there of February 18th I am assuming that this was the main order of business was the disciplining of these three girls? A. This is true.

[30] Q. Were any of the other girls discussed that had drank any of the punch or done anything of that nature? A. No, sir, to our knowledge this had not come up at this time.

Q. At this time you were going purely on what you had been told by Jo Wall and Virginia Crain and Peggy Strickland, is that right? A. What has been related to me by Mrs. Powell and Mr. Waller.

Q. And you understood, I am sure, that they had gotten their information from the three girls? A. That was my understanding.

Q. And were there any witnesses at that meeting other than Mr. Waller and Mrs. Powell who claimed to have any information about it? A. There was not.

Q. Of course none of the parents were there? A. That is true.

Q. And neither of the three girls were there? A. That is true.

Q. And neither were any of the other girls that you later learned may have had some part in it? A. That is correct.

Q. Now, Mr. Waller testified about a telephone call that came in; up until the 'phone call came in had you said **[31]** anything yourself to the Board about the case? A. Merely introduced Mrs. Powell and Mr. Waller to the Board, that they would explain in detail what the situation was.

Q. And did Mrs. Powell go on first with her version? A. She did.

Q. Did she make any recommendation for leniency? A. Yes, she did.

Q. What did she recommend in that connection? A. She went into detail as has already been covered that she asked for leniency as near as the Board—to the extent that the Board was able to operating under their policy recognizing they had

the responsibility but she was appealing to them if there was room for leniency that it be given in this case.

Q. Was this on the theory that that rule made it mandatory that they be expelled for the remainder of the semester? A. I am not sure about this. I do not think so necessarily.

Q. You could not get from her recommendation whether or not she was recommending that it be less than the balance of the semester? A. I think she realized that it could possibly be less and she was appealing to them to make such a decision, if possible.

Q. For it to be less? **[32]** A. Yes, sir.

Q. What about Mr. Waller, did he finish his recommendation? A. Yes, sir, as far as I know he had completed it.

Q. And were his recommendations similar to those of Mrs. Powell that leniency be shown the girls? A. They were.

Q. You actually took the 'phone call that came in? A. I did.

Q. Who made that 'phone call? A. Mr. Powell, who is the husband of Mrs. Powell, also a teacher in the school system.

Q. What kind of a teacher is he, what position? A. He is a science teacher.

Q. And he purported to relate to you over the telephone something that had happened where? A. Outside the gymnasium.

Q. That same evening? A. Yes, sir.

Q. Did he claim to have witnessed it himself? A. He did not.

Q. Some one had just told him about it? A. That is true.

Q. All right, and in relating this to you did he tell you whether or not any of these three girls were involved according to his information? **[33]** A. He did.

Q. Which one did he mention? A. Jo Wall.

Q. Did he mention either Virginia Crain or Peggy Strickland? A. He did not.

Q. Now, then, after you received this information what did you do? A. I reported it to the Board, the nature of the conversation, the information that Mr. Powell had given me.

Q. Did you give them a pretty full rendition of it? A. I think so.

Q. You did not tell them that Mr. Powell had mentioned only Jo Wall? A. I did not.

Q. But you did tell them that it was one of the girls that was involved in this same thing that they were considering? A. Yes, sir.

Q. But you did not tell them which one? A. I did not.

Q. Did they ask you which one? A. Later but not at that time.

Q. Now, did this information which you related to the Board have any noticeable effect on either Mrs. Powell or Mr. Waller? **[34]** A. Yes, sir. They were concerned about the fact that one of the girls—and they did not know who—that one of the girls had been involved in another incident.

Q. And what did they say to the Board about that, if anything? A. I think as has been related that Mrs. Powell said "well, I just wash my hands of it" and Mr. Waller said "I withdraw my recommendation."

Q. Up until that time had the Board voted on whether or not to expel these three children? A. They had not.

Q. Did they later vote on it? A. Yes, they did.

Q. And they voted to expel all three of them? A. Yes, they did.

Q. And you let that all go on there without telling them that only Jo Wall had been mentioned to you on the telephone? A. That is true.

Q. Now, then, the meeting of March 2nd, which was called at my request, I believe; you called that meeting, did you not? A. No, sir. I did not call the meeting. I talked with the Board concerning it and Mr. Stevenson called the meeting.

Q. Did you get out any notices? **[35]** A. I did contact the members with such a notice, yes, sir.

Q. Had there been any meeting of the Board between February 18th and March 2nd? A. There had not.

Q. Had you been in contact with the Board members yourself? A. Yes, sir.

Q. Had any two or three of them met on this matter? A. No, sir, not to my knowledge.

Q. Now, did you have a teachers' meeting any time on March 2nd, earlier during the day of March 2nd or March 1st, did you have a teachers' meeting? A. I do not believe so, Mr. Core. I am not sure. We had a meeting along about that time but whether it was that same day or not I am not sure.

Q. Did you yourself or someone at your direction tell the teachers not to attend that meeting on March 2nd? A. Tell the teachers not to attend?

Q. Yes. A. No, sir.

Q. Did not tell any teacher not to attend? A. No, sir.

Q. Did you know that I had called Peggy's home room teacher, Mrs. Gazell, and ask her to be present, be there? A. Yes, sir.

Q. Did you talk to her about that? **[36]** A. I talked with her later that day; she came to me, I did not send for her, she came to me.

Q. What did you tell her about attending any meeting that night? A. I told her she did not have to attend; if she cared to certainly she would be welcome to attend.

Q. Did you tell any other teacher not to attend? A. No, sir, I did not.

Q. Now, on the occasion of the meeting of course you did attend, didn't you? A. Yes, sir.

Q. You took the minutes of the meeting? A. Yes, sir.

Q. Did you know that Mr. Waller was there in the building? A. I did.

Q. Did the Board know that? A. Yes, sir.

Q. Did you know that Mrs. Powell was there in the building? A. Yes, sir.

Q. Did the Board know that? A. I think so. Some of them at least.

Q. Mrs. Gazell, did she happen to be in the building too? A. Not to my knowledge, no, sir.

Q. She is the home room teacher for these girls, isn't she? **[37]** A. Yes, sir.

Q. I take it, Mr. Enlow, that you did not have anything to do yourself with suspending these children? A. I did not make a recommendation at all.

Q. Did the Board have before them at any time prior to voting to suspend or to expel, did they have a bottle of the liquor in question? A. Not to my knowledge, no, sir.

Q. And of course Mr. Waller did not know what to tell them what was in it, did he; he did not know what was in it or did he undertake to tell them what was in it? A. I believe Mr. Waller reported to you a while ago what he knew and I have nothing to add to that.

Q. The same thing with Mrs. Powell too, you don't have anything to add to what she said or he said? A. No, I do not.

Q. There was really no proof before the Board as to what the alcoholic content was, was there? A. Not unless it was the Board's own knowledge concerning this, there was none present.

Q. You did not drink any of the punch yourself? A. No, sir, I was not present at the meeting.

Q. That is all.

[38] Q. How long has that rule been in effect? A. Since 1967, January 10.

Q. And you, of course, was there at the time it was adopted? A. Yes, sir, I was.

Q. Can you recall whether or not it was adopted at a regular meeting and in the regular course of business? A. No, sir, I am not positive whether it was a regular meeting or not; I think so.

Q. Your minutes would reflect that, would it not? A. Yes, sir.

Q. Have you expelled anybody other than the Zink boy and these three kids, have you expelled anybody else under that rule? A. No, sir, I don't believe so.

Q. Your witness.

The Court: Let me ask one thing or so and then you can have him back. Mr. Enlow, did you write the manual of policy or did you inherit it?

A. No sir. It was written, it has been written since I have been there.

[39] The Court: Since you have been there?

A. Yes, sir.

The Court: All we have in this case here, and I am sure you have seen it, is one page from it. Is there a provision in the entire manual for a hearing before the Board such as a petition for re-instatement?

A. Yes, sir, there is a provision. I am not sure whether it says re-instatement of students, there is a provision for hearing complaints from any person.

The Court: In fairness to both sides has that provision been followed in this case, or procedure?

A. Yes, sir, I think so.

The Court: That is all I wanted to know. You did pursue the course set forth in the manual for the hearing to review after Mr. Core called you?

A. Yes, sir.

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[41] **MR. ED W. STEVENSON,**
after first being duly sworn, testified as follows:

Cross-Examination, by Mr. Core

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Q. You mentioned that in your opinion there would be complete havoc among the students if these children are re-instated; did I understand you right? A. I made the statement, Mr. Core, that I believe that we might have havoc in our school system trying to enforce discipline if an injunction was granted due to the fact that other students would try to bring alcoholic beverages on the campus too. I don't think there is room for that in our school system.

Q. You mean the children down there at Mena are just waiting for an indication that it is alright to bring alcoholic beverages on the campus and they are just suddenly all will bring a whole bunch of that on there? [42] A. No, sir, I did not say that, you said it.

Q. I think that is what you said? A. No, sir, I do not believe it was.

Q. Don't you know that the sentiment among all the people down there is that you have been too severe on these children? A. Mr. Core, I think you are mistaken there. I do not think the sentiment runs a hundred percent that we have been too hard on these youngsters. I think that if you will check around that you would find that the sentiment lies on both sides of the fence so to speak. There are those that think we have done the right thing.

Q. But just about ninety percent of the sentiment that think it is too severe? A. No, sir, I would not say it was.

Q. It is well over half would you say? A. I do not know.

Q. I want to ask you, Mr. Stevenson, you presided at the meeting of February 18th and also March 2nd? A. That is correct.

Q. You have heard Mr. Waller testify and Mr. Enlow testify about what occurred at both of those meetings? A. Yes, sir.

Q. Are you agreeable with Mr. Waller and Mr. Enlow that two teachers had made recommendations for leniency up [43] until the time that Mr. Enlow reported the telephone call? A. Yes, sir.

Q. And do you feel that the telephone call had any effect on those two people, Mrs. Powell and Mr. Waller? A. Yes, sir, I am sure it had an effect on them.

Q. You have heard Mr. Waller say that he withdrew his recommendation at that time? A. Yes, sir.

Q. Did he do that? A. Yes, sir.

Q. And that Mrs. Powell said she washed her hands of the whole thing at that time? A. Yes, sir.

Q. Did she do that? A. Yes, sir.

Q. And then did you hear any more witnesses after that about it? A. No, sir.

Q. You then took your vote? A. No, sir, we discussed it in the Board meeting.

Q. You discussed it among the Board members? A. Discussed it among the Board members, that is correct.

Q. What else did you do before you voted? A. We, as I say, had a discussion of the matter at that point [44] we asked if any punishment would be recommended by any of the members. There was no other form of punishment recommended, at that point it was unanimously agreed that the students would be suspended for the balance of the semester.

Q. Were you advised that up until that time they had been suspended for only one week? A. Yes, sir.

Q. So the Board upon the basis of the information that it had acquired at this meeting suspended them for the balance of the term? A. Yes, sir.

Q. At that time you had not talked to Mr. Bob Shaw, had you? A. No, sir. I had not.

Q. You had not seen a bottle of that Exhibit No. 3 over there, had you? A. No, sir, I had not, Mr. Core, but I knew it was alcoholic and you know that it is alcoholic; malt liquors are alcoholic, no question about that.

Q. Will you let me testify about my knowledge—— A. Excuse me.

Q. Let me ask you about yours, how do you know it is alcoholic? A. Because I checked with the Prosecuting Attorney in Mena, [45] Arkansas, and I have checked with several other people and, in fact, you yourself admitted a while ago that it had 3.1 percent.

Q. Now, Mr. Stevenson, if you don't mind let's stick with your knowledge. A. All right.

Q. Now, these people that you checked with, as I understand you, all that checking was done after that meeting on February 18th? A. Yes, sir.

Q. You had not checked with anybody before the meeting of February 18th? A. Yes, sir.

Q. Who had you checked with? A. I am agreeing with you, I said yes, sir, and that is right.

Q. In other words yes, sir, you had not checked with anybody? A. Yes, sir.

Q. Have you drank any of it yourself? A. No, I have not.

Q. Now, you said that when you go to Dogpatch it is just common knowledge that when you go over there what ever you bring back is intoxicating? A. No, I did not say that. When you bring malt liquor back **[46]** from over there it is intoxicating.

Q. I understood you to say that it is common knowledge around the country where we live that when you go to Dogpatch and pick up something it is intoxicating, did I understand you wrong? A. I believe I did say, yes, sir, if we want something that is not we just go down to the store and buy it.

Q. Do you buy your intoxicants over at Dogpatch? A. No, sir, I don't.

Q. Do you know whether you can get soda-pop, coke, things like that over there? A. I imagine they do sell soda-pop and coke, yes, sir.

Q. And of course that is not supposed to be intoxicating, is it? A. No, sir, it is not.

Q. Now, then, if you based your conclusion of what these kids put in that punch was intoxicating on the mere fact that it

was bought at Dogpatch don't you think you would have been jumping at a conclusion? A. Yes, sir, I do.

Q. But yet that figured in your decision, didn't it, the fact that they had gotten it over there? A. No, sir I do not believe it did, Mr. Core. I think what figured in our decision was the fact that this was malt liquor that was bought in Oklahoma——

[47] Q. How did you know it was malt liquor? A. We were told that it was malt liquor and the girls freely admitted that it was malt liquor and that they had secured it in Oklahoma.

Q. When did you talk to the girls? A. I did not talk with the girls.

Q. Let's talk about what you knew on February 18th. A. All right.

Q. Who had told you it was malt liquor on February 18th? A. Mr. P. T. Waller.

Q. P. T. Waller—— A. Mrs. Curtis Powell.

Q. Anybody else? A. Mr. S. L. Enlow.

Q. Anybody else? A. No, sir.

Q. That is all. Now, Mr. Waller said that Mrs. Curtis Powell told you that it was intoxicants; do you remember her saying whether it was intoxicating liquor or not? A. I remember her saying that they had gotten malt liquor from Oklahoma, yes, sir.

Q. So it was three people you heard say that? A. Yes, sir.

Q. And on the basis of that information what you got from those three people, Mr. Enlow, Mr. Waller and Mrs. **[48]** Powell you and the other members of the Board took your action? A. Yes, sir.

Q. The telephone call that came in during the meeting, you heard him testify he did report to you? A. Yes, sir.

Q. Do you remember that he did report to you? A. Yes, sir.

Q. You heard him testify that he did not tell you which girl was involved in that? A. Yes, sir.

Q. Is that true he did not tell you? A. Yes, sir. That is true.

Q. Did you ask him? A. No, sir.

Q. Did any of the Board members ask him? A. No, sir.

Q. Did he say one girl or three girls? A. He did not say.

Q. What did he say? A. He just told us that he had a call to the effect that there had been an altercation at the gymnasium following the basketball game, one of the girls involved or the **[49]** girls involved—I could not quote you verbatim—one of the girls involved, it occurred after the basketball game, at that time the recommendations were withdrawn by the administration.

Q. You don't remember whether Mr. Enlow said one of the girls involved or the girls involved? A. I do not, no, sir.

Q. Did you assume that all three of them were involved? A. No, sir, I did not.

Q. Would it have made any difference to you? A. No, sir, I do not believe it would have.

Q. Did the telephone call make any difference to you? A. No, sir, it did not.

Q. So you disregarded it altogether what Mr. Enlow had said? A. No, sir, I did not disregard it.

Q. What did you do about it, what effect did it have on you if you did not disregard it? A. As Mr. Enlow told you a few moments ago we are not bound by Mr. Enlow's recommendations.

Q. I understand that but I am asking you a different question. A. All right.

Q. What effect, if anything, did what he reported to you have on your decision? A. Well, I guess it would be hard to say that it had a good effect on our decision but as far as adversely affecting **[50]** the decision of the Board as such I could not comment on that. I can only speak for myself. I cannot speak for the other members of the Board.

Q. Up until the 'phone call came in there were only two teachers there that purported to have talked with the girls were recommending leniency? A. That is correct.

Q. And didn't you tell Mr. and Mrs. Justice that if anybody had gotten up and asked for leniency the Board would have granted it? A. No, sir, I did not.

Q. You deny having told that? A. I deny that, yes, sir.

Q. With two of your teachers there recommending leniency are you telling me that the Board would go ahead and suspend them for the balance of the term with the only two teachers before you recommending that you be lenient? A. Would you state your question again?

Q. Let's assume the telephone call had never come in? A. All right.

Q. And you act on the basis of having two teachers there that are purported to have talked to the girls—— A. Yes, sir.

Q. Both of them recommending leniency; are you telling me that the Board would have gone ahead and suspended them **[51]** for the rest of the term? A. It is possible, yes, sir.

Q. It is also possible that they would have followed the recommendations too? A. That is right, it is possible.

Q. Of course you can't say and I can't say? A. No, sir, I can't.

Q. Now, the investigation that you conducted of course was done about the alcoholic content was done after the children had been suspended for the rest of the term? A. I believe it

was done on Saturday night after they had been suspended on Friday, Mr. Core.

Q. And you got that from Mr. Bob Shaw who is Deputy Prosecuting Attorney? A. That is correct, yes, sir.

Q. And he told you that he prosecutes them all the time for possession of it? A. Yes, sir.

Q. Did he tell you that he knew what the alcoholic content was in it? A. He told me that it was a high alcoholic content.

Q. Did he give you any percentage or anything like that? A. No, sir, he did not.

Q. Do you know Mr. Bob Show to be an expert on alcoholic? **[52]** A. No, I don't.

Q. Did you conduct or consult anybody you did consider to be an expert on that? A. No, I took the unopened bottles, completely sealed, and turned it to Mr. Bob Shaw at that time and asked him to send it to the State Board of Health to have it analyzed.

Q. Have you gotten any report back? A. No, I do not have any report.

Q. Now, Mr. Justice brought you one of these bottles, didn't he? A. That is right.

Q. Did you read the label on it? A. Yes, sir.

Q. Did you notice it was bottled by Theodore Hamm Company, Minneapolis, Minnesota? A. Yes, sir.

Q. Did you call them? A. No, sir.

Q. Don't you think they would know what was in it? A. I imagine so, yes.

Q. Now, then, that it is 3.1 by weight alcohol and that the twelve ounce bottle, two of those twelve ounce bottles were put

in a gallon and a half of water how much alcohol have you got in there? **[53]** A. I could not say, Mr. Core, I do not know.

Q. Isn't it about two-thirds of an ounce? A. Possibly so.

Q. In a gallon and a half of water? A. I don't know.

Q. Do you consider that an alcoholic beverage? A. Mr. Core, I consider the fact that that is an alcoholic beverage and that it was put into the punch, yes, sir, I do.

Q. Don't you think you should have gone into those questions before you kicked three kids out of school for the rest of the semester? A. We investigated that possibility as I told Mr. and Mrs.—or Mrs. Justice the following morning and the Reverend Jordan at my home if that was determined not to be an alcoholic beverage that it most likely would shed a different light.

Q. Don't you think you should have done that before you kicked them out? A. No, sir.

Q. And you have not done it yet, have you; you don't know what is in that bottle, do you? A. No, sir, but I have exercised all due care to find out.

Q. You have gone ahead and suspended, taken part in expelling three kids for the rest of the year without knowing, have **[54]** not you? A. Without knowing the exact content yes.

Q. When all it would have taken was a telephone call to St. Paul, Minnesota, and you would have found out what was in it? A. I guess you are right.

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In the United States District Court
Western District of Arkansas

(Title Omitted in Printing)

REPORTER'S TRANSCRIPT OF THE COURT'S FINDINGS OF FACT MADE ON MARCH 7, 1972

(Filed on April 10, 1972)

PROCEEDINGS OF MARCH 7, 1972

[2] The Court: No Court ever likes to decide cases of this kind and if, ten years ago, anyone had told me that a Federal Court would be hearing a case concerning an Arkansas school I would have felt that the man was crazy until the decision in the case of Brown against Board of Education of Topeka which was actually in 1954 and a lot longer ago than I said. I think that we would have been shocked that anybody but the State of Arkansas had anything to do with its own school system because it is the Arkansas School system and there is no disposition by this District Court to intervene in any activity of the public school system, that is not actually required. All right, with that as a background this brief comment upon the facts in this case; it has been shown to the satisfaction of all that two pretty little girls in the 10th grade who are right at the age when they develop more quickly than the boys and they think they are young ladies, they are older than their age, actually, indulge in a childish prank and decided to spike the punch. I think their testimony admits that is what they planned to do alright. All right, under the laws of Arkansas, Article 14, Section 1, of the Constitution provides for a free **[3]** school system and then the laws of Arkansas contain a compulsory school law and these young ladies come within it. So they not only have the right to go to school they are compelled to go to school. We have some other statutes that deal with the age

of students permitted to attend school. I doubt now that anybody above the age of 21 can be permitted to attend if there are adult education programs. That would sound like it would be without restrictions but it is not without restrictions. Arkansas, by its Statutes, Title 80-1656, provides that nothing in the Act shall be construed to limit a local school district's power to adopt reasonable rules, regulations and policies, and then it goes on and quotes quite a bit further than that. We are in a strange situation in this case. This is an application for a temporary restraining order. Under Rule 65 of the Federal Rules of Civil Procedure under which a temporary restraining order could be issued if there is immediate danger of, as we say, an irreparable injury or immediate injury, loss or damage, which would happen before a trial could be tried on its merits. That puts the burden on Mr. Core and his clients to show such a situation. At the time we are dealing with a case where two young ladies are required to attend school and the school has **[4]** passed regulations which the school has the burden of showing it had a right to promulgate. It will be the finding of this Court that the School Board not only had the right but did promulgate a Code of Regulations, if you want to call it that, or a manual that provided that pupils found to be guilty of any of the following shall be suspended from school on the first offense for the balance of the semester and such suspension will be noted on the permanent record of the student along with reason for suspension. Item Four under that is listed the use of intoxicating beverages or possession of same at school or at a school-sponsored activity. The Court finds that the school had the right to adopt that rule; they did adopt that rule, and that the School Board had reasonable grounds to believe that that rule had been violated at the time it took its initial action in this case. Consequently the temporary application—the application for temporary restraining order will be overruled, denied. Maybe from here on out I should explain that it is not the Court's policy or prerogative to lecture anybody, but we have this that I think should be called to everybody's attention. You

can have a constitutional rule and then if it is unconstitutionally applied [5] or mistakenly applied you could do just as much harm to a pupil as if you had intentionally done something. The Supreme Court of the United States has held over and over that the depriving of any student of school days can indeed cause very serious harm. All right; now, having denied this Order let me call your attention to this, I have had grave questions throughout this trial as to whether this concoction from which these students got such a terrific charge was ever an intoxicating beverage. I am just inclined that on a hearing on the merits of this case when we ever get to it I will be interested to see what that is because as both Mr. Hardegree and Mr. Core know the term "intoxicating beverage" as used in the manual is not defined but the term "intoxicating liquor" is certainly well defined under the Arkansas laws and it provides that it must be a content in excess of 3.2 or 5 percent by weight and I am afraid the School Board is or has made a mistake here but I do not see any constitutional thing within the jurisdiction of this Court that requires any intervention by the Court at this time on the temporary application. If it ever reaches the matter of proof on the intoxicating angle I don't think you will ever be able to prove that thing there—in spite of the fact that these little girls giggled around [6] and got themselves kicked out of school on such a silly thing—I don't think you will ever be able to prove that that stuff is intoxicating. I will just pass along that to you. Now, gentlemen, you are in here because I think rather unfortunately a number of years ago the Supreme Court of the United States declared that a school is a state agency. We thought all the time that our public schools down here were our own private little district schools that we could operate paternalistically and supervise our own children kind of in the manner that we wanted to. Unfortunately they have said the public schools are a state agency which means that all policy has to comply with the provisions of the 14th Amendment which means that it must be applied equally. Everybody has got equal protection and you cannot apply it one way one

time and one another. From that sprang up all of our troubles of integration and either coincidentally or caused by it plus the coincidents, I say incidents or cause, one or the other long hair, extreme hair styles, oddities of dress, our daughters go from short skirts, so short you cannot see it one day to sweeping the ground the next day. Idiosyncrasies of dress, all of that has gone along with a kind of a spirit of rebellion, we since run into in all the schools, and integration [7] I think blew it all into big flame. Now, these little girls at the age of 16 are too big, too mature, for their parents to paddle. If these were two boys in this case I would say to the parents "take them home behind the woodshed and apply a little bit of wood to their seats" and I think this whole thing would be solved. But you cannot do that in the South where we have a double standard, one for boys and one for girls. I don't think the little girls are trying to tell on anybody else. I don't think that Mr. Core wants any other child kicked out of school. I don't think the parents are trying to tell on anybody else or cause anybody any trouble. The parents are trying to help their children because going to school right at this time is very important. I do not think it is irreparable. These two little girls impress me as being smart enough that they could take correspondence work if necessary and move right along with their group. I think they could. I hope that the School Board down at Mena will meet and give this matter serious consideration and if these young ladies see fit to come forward and apologize and they appear to me to be completely repentant, I bet there is not a soul in the courtroom that has heard the proof that does not have their charitable instincts going out to them. We just say [8] these children are being punished too severely, but that is one side of it and running a good school down at Mena is another side of it. I don't find there is a thing unconstitutional in this manual. I think that it is completely constitutional. If there is anything unconstitutional it is the manner in which the Board has enforced it in this case. Let me say this, gentlemen. It is a whole lot like your traffic officers have to be in a city or in a town,

say, in Mena, an officer who does not instinctively know the difference between an innocent traffic offender and an habitual criminal who is violating peoples' rights has no business being given an arrest book and authority to arrest people on the streets, just ought not to have them. If you have officers who just cannot tell that difference then I think you should look about your officers. Now, you say well, the being on the School Board is a great responsibility, it is a great honor, a thankless one; I personally have served on a school board ten years or some longer, I would say it is the most thankless job ever in the world, I think that everybody who thinks that all of his friends and neighbors love him ought to have to serve on a school board one time so that he will know that they don't; they don't love him, they don't approve of what he does and they question **[9]** his conduct and question his motives. I don't think they intend to do it uncharitably but you are just placed in such a thankless position by reason of being there. Now, let me say this to the School Board; you are elected, some of you may have had appointments, regardless of whether you want to be elected again remember that the Courts have not gone so far into your affairs that we won't let you run your schools. I cannot say that it won't reach that point. Many people tell me that our public schools are right on the verge of being nothing but a civil service thing where all of your teachers will be civil service employees and the Federal Government will wipe out the other agencies of the state. I do not believe it, I hope they will swing back the other way because we need our schools to fulfill the paternal side, the family side. The reason I don't think they are right about it is because I don't think the mothers are ever going to consent to babysit their own children, they are going to send them to school just as quickly as they can and our schools have been performing a wonderful service. I have criticized a lot of people here. I don't know, they may say that their School Board is completely knowledgable and their actions concerning this childish prank is justified, and, on the other hand, there will **[10]** be some that take a look at their School Board that serves

without pay and the giving of their time, say, "By the way, I never saw such a bunch of old fuddy-duddies that are not up to the times". That brings me down to another thing, to your manual. Now, gentlemen, this manual is binding on your school executives and administrators. The school administrators have no choice but do just what they have done because that manual is binding on them, but to the School Board that manual is not sacred in any manner. You enacted it, you can change it, you can abolish it, you can amend it, you can make it fit the situation and, among the other duties that you have running that good school down there, is to make those things fit your community. I encourage you to do that. I hope you will look at it and that you will say "by the way, this is a little too harsh a remedy." Now, a few generations ago we thought nothing of the electric chair, thought nothing about execution, thought nothing about pretty severe penalties. Now then the Courts all over the land are saying that is cruel and inhuman punishment, not any such thing as capital punishment. Adapt your Mena schools to the times. I do not want you to think that because you passed something, said something about an intoxicating liquor that that is sacred and **[11]** cannot ever be changed. I know that you have had the same experiences that I have had. I live in a small town, not as large as Mena. At the end of school I have always wondered, you know the boys particularly, when they march out the ones that are at the head of the line the first thing is their cap goes flying through the air and you hear a lot of hollering. I have always wondered just how beer was in that "yippie". You cannot close your eyes to the facts of life. This may be one of those cases where you need to temper justice with mercy. I want you to go ahead and run your school. A long time ago a real smart man said "Let he among you that is without sin cast the first stone." The School Board needs to bear this in mind in this case. It is not a part of the Court Order but I encourage the School Board to meet immediately and see if this matter can be resolved in a practical way. It would be a grave injustice if this were not an intoxicat-

ing to keep two girls out because the School Board has made a mistake about it and it takes a big School Board to say to a community "we have looked into this and we are wrong, we are just slapdaub wrong." If we are wrong let's say so and get on back to our business and these young ladies and this other one come forward, Mr. Zink, and convince you that they are trying to do right. Sometimes a [12] real good citizen as a child has given you a little bit of trouble in the past. We have had people who were convicted of a crime make good citizens. Now, we are through with the speaking part of it. Mr. Core, your application will be denied and this will be transcribed and will constitute the Findings of Fact. If you desire to appeal I would include in it those provisions that are required and the Order for Appeal will be perfected.

In the United States District Court
Western District of Arkansas

(Title omitted in printing)

ORDER

(Filed March 7, 1972)

On this March 7, 1972, the above entitled cause comes on for a hearing on plaintiffs' motion for a preliminary injunction, the plaintiffs appearing by Mr. Ben Core, their attorney, and the defendants appearing by Mr. Joe Hardegree, their attorney.

Upon consideration of the testimony adduced at the hearing and the exhibits introduced, the court announces orally from the bench its findings of fact and conclusions of law. Pursuant thereto.

It Is Ordered and Adjudged that plaintiffs' motion for a preliminary injunction be and it is denied.

/s/ PAUL X. WILLIAMS
United States District Judge

In the United States District Court
Western District of Arkansas

(Title omitted in printing)

ANSWER OF DEFENDANTS

(Filed March 10, 1972)

Comes now S. L. Inlow, Duddy Waller, John P. Wood, Ed Stevenson, Bob Philpot, Jim Ayleshire, Raymond Stroud, Bill Plunket, Rachel Goforth and Mena Special School District, and for answer to the complaint filed herein would state and show unto the Court as follows:

1. The Defendants and each of them denied generally and specifically each and all of the material obligations of the complaint filed herein by Peggy Strickland, a minor, and others, and ask that the Plaintiffs be put upon strict proof of all such allegations not specifically hereinafter admitted.

2. The Defendants admit that S. L. Inlow is Superintendent of Schools at Mena, Arkansas, and that Duddy Waller is Principal of the High School at Mena, Arkansas, and that the remaining individual Defendants are members of the School Board of Mena Special School District, and that the individual Defendants are residents of Polk County, Arkansas. It is further admitted that the Plaintiffs in this action, Peggy Strickland and Virginia Crain, were students in Mena High School prior to February 18, 1972, and were at that time expelled by administrative action and by action of the Board of Directors of Mena Special School District.

3. The rule or regulation set out in Paragraph Six of the Complaint filed herein is in fact a rule, guideline or policy of the Mena Special School District, adopted by the Board of Directors of the Mena Special School District in 1967.

Wherefore, the Defendants pray that the Complaint filed herein be dismissed and that the Defendants have their costs of Court incurred, and other relief to which they may show themselves to be entitled.

(Signatures and certificate omitted)

In the United States District Court
Western District of Arkansas

(Title omitted in printing)

PROCEEDINGS OF APRIL 7, 1972
Before Honorable Paul X. Williams, United States District Judge, Held in Connection With Plaintiffs' Motion to Amend Complaint

(Transcript filed September 8, 1972)

The Court: Before you sit down have you checked the report in the Mena Evening Star concerning the four boys that were suspended; it is the March 27th's, Monday, is the date of issue?

Mr. Hardegree: Yes, sir.

The Court: Does the School Board contend that is an incorrect recitation of what happened; is it in error?

Mr. Hardegree: Not that I know of, sir.

The Court: Mr. Hardegree, could you arrange for the School Board meet and let these little girls make an apology and ask to be re-instated and then ask if Mr. Stevenson would put the same question in the same manner as he did in the other case, that is, he asked for a Motion to uphold the expulsion. After Mr. Bob Philpot made the Motion they never could get a

second. Could [3] you arrange for that to be done and then advise the Court next week?

Mr. Hardegree: I can if the Court so requests.

The Court: I so request and I invite them to reconsider the case of the boy that was expelled before but since he is not a party to this lawsuit I don't have anything to do with that but as a matter of principle. You know that I have only been concerned in this case with two things, whether or not a constitutional question has been raised, and I think that my ruling at the preliminary hearing pretty well settled that the Board's regulations were within the constitutional framework and I am convinced that is right; but I am confronted with a question of whether or not it is being constitutionally enforced. Now, Mr. Hardegree, if your School Board had the four little boys up and their fathers were politically powerful enough in their [4] community that they could keep their boys in school and then that same School Board turns around and kicks out two little girls and this first little boy that is an unconstitutional enforcement of a constitutional power, just plain is.

Mr. Hardegree: I am sure it is.

The Court: Personally, from what I have read and heard here I think the Board correctly handled the four little boys' cases. That sounds to me about what ought to be done. Now, the fact that they were not on the premises during the noon hour—now we all know students that go to school in the morning, except in the case of a few, will slip off and smoke cigarettes and a few who go home and eat—the school has got them until the termination in the afternoon, particularly if they are bus children. I am not persuaded by the fact that they slipped off and got in a car across the street [5] to drink their beer; and let me say this, I commend the Board for having the intestinal fortitude to handle the little boys just like they did—the thing I am questioning is whether they are being fair to these other people, you have kind of got to be consistent about these things.

Mr. Hardegree: Yes, Your Honor. I think the Board understands that and I think the Board would like for the Court to understand it, Your Honor, they are very serious minded about this case and are not acting arbitrarily in their estimation.

The Court: I do not want to be placed in the attitude, if it can be avoided, of saying that the Mena School Board has to come to the United States District Court to be ordered to do that which the Constitution of the State of Arkansas says they ought to do. I would like for them to work it out and not have any such precedent on the [6] record. I hope it will get back in time to where the Federal Courts won't take these school cases. I always lived thinking that the State of Arkansas had the say; the Federal Government at that time did not support our school system, did not create the school system, and, I thought, did not have any right to interfere with it. In this case you do not have the color problem. If these were colored people, if they were black people, I think the Court would have to jump in and do something or the Eighth Circuit would murder me, but unfortunately for these people they are white people, southern white people, but they ought to be treated just as fairly as little black people. I think the School Board ought to be big enough to face up to it and not make me have to make an Order about running the schools; I do not want to have to make any orders about a school district; I think the schools would be [7] better off if we could keep the Courts out of the schools. I do not plan to rule on this application until I get the report. Can you give it to me within a week?

Mr. Hardegree: We will, Your Honor.

The Court: If you care to see the report that Lewis Jones from Fayetteville filed in the Huntsville School case I would be glad to let you see that. Their School Board met and handled their problems and everything was taken care of all right.

Mr. Core: Could we request a setting for trial in these cases?

The Court: As soon as I rule on your Motions—after I get that—we will set it for trial.

Mr. Hardegree: Hopefully that will not come to pass but if the Court should grant the Motion and should be talking about a setting—we reserve the right to answer their pleadings as amended and after the Motion is granted.

The Court: We will move along in an orderly manner, the damage is being done every day a child is out of school. I have [8] heard enough to know the little girls are at fault; but hasn't the rule been unconstitutionally applied? That is the only thing that bothers me. Give me your report within a week and then I will pass on Mr. Core's application. I do not want the School Board to think it is being clubbed to death about this matter but since these children are not black children and no question of race or color in it there is a big doubt in my mind they could qualify under 42-1983. That is the right to vote and things of that kind. It is aimed at color; but I still do not see why white folks cannot be treated as fairly as blacks. We will recess this until we get the report.

* * * * * * *

DEFENDANTS' REPORT TO COURT

April 12, 1972

Honorable Paul X. Williams
United States District Court
Western District of Arkansas
Federal Building
Fort Smith, Arkansas 72901

Re: Justice, et al. vs. Mena Special School District, et al.
Civil No. FS 72-C-11
Report to Court on further meeting

Dear Judge Williams:

In accordance with the request of the Court made at the last appearance in Court on this cause, the Mena School Board met in regular session on Tuesday, April 11, 1972, at 7:30 p. m. in the High School building. Present at the meeting were Mr. Stevenson, president of the Board, Mrs. Goforth, Mr. Forrest Ogden, Mr. J. M. Aleshire, Mr. Raymond Stroud, and Mr. Bob Philpot. Also present was Mr. Inlow, superintendent of the Mena schools, and Mr. Justice along with Miss Peggy Strickland, and Mrs. Doris Crain along with Virginia Crain, and other persons there in the position of spectators.

The remarks and statement of the Court, which had been reduced to writing and forwarded to Mr. Stevenson, were read to the School Board and those persons in attendance. The petitioning students, Miss Strickland and Miss Crain, together with their parents, were given an opportunity to make a statement, and statements were made on behalf of each child. Mr. Stevenson then entertained a motion for reinstatement of all three of these children into the school system.

Mr. Ogden moved that the children be reinstated in school, and his motion was seconded by Mr. Aleshire. When the question

was called, Mr. Stevenson called for a vote, and the vote was recorded on the motion as follows: Mr. Ogden and Mrs. Aleshire for the motion; Mr. Stroud abstaining on the question; and Mr. Stevenson, Mrs. Goforth and Mr. Philpot voting against the motion. Mr. Stevenson then announced that the motion failed to carry.

Judge Williams, if there is anything further I can do along this line and in connection with your request, or otherwise, please advise.

Respectfully

Joe H. Hardegree

In the United States District Court
Western District of Arkansas

(Title omitted in printing)

AMENDMENT TO COMPLAINT

(Filed March 14, 1972)

Now come the plaintiffs herein and amend their Complaint in the following particulars:

1. The actions of the defendants as specified in the Complaint heretofore filed in this cause, and each of them, has damaged each of these plaintiffs by depriving them, unlawfully, of their right to attend the public school at Mena, Arkansas, and by forcing them to pursue some substitute means of education at their expense and inconvenience; and further has caused and will continue to cause humiliation and embarrassment to the plaintiffs by reason of the stigma attached to the action of the defendants in assessing excessive punishment by way of expulsion of each of the plaintiffs for the balance of the term

and for enforcement of the School Board policy under color of State Law requiring the making of a record of the unlawful punishment assessed against these plaintiffs, which record will continue to follow, harass, intimidate, abuse and embarrass the plaintiffs for the remainder of their lives. In addition, the plaintiffs have been and are being compelled to litigate with the defendants their right to attend the public schools of Mena, Arkansas, at great inconvenience and expense and will continue to do so until this litigation is terminated.

2. By reason of the foregoing actions of the defendants herein the plaintiffs have been damaged and will be damaged by the time of the trial in this case in the amount of $25,000.00 each.

3. The plaintiffs further allege that the actions of the defendants have been taken with malice toward these plaintiffs and without any bases therefor and with such wanton disregard of the rights of these plaintiffs as to subject themselves personally and individually, and as to subject the school district which they represent, to punitive damages in this case in the amount of $5,000.00 for each defendant herein.

Wherefore, the plaintiffs pray judgment against the defendants and each of them, in their personal and individual capacaties respectively, and against the defendant school district, jointly and severally, in the amount of $25,000.00 as compensatory damages and reasonable attorney's fee for each plaintiff herein; and further pray judgment against each defendant, personally and individually, and against the defendant school district, for punitive damages in the amount of $5,000.00 against each such defendant. The plaintiffs further pray judgment for all of their costs herein laid out and expended.

(Signatures and certificates omitted.)

In the United States District Court
Western District of Arkansas

(Title omitted in printing)

DEPOSITION
Upon Interrogatories and Cross Interrogatories of
ANDREW SPAHL

1. Please state your name, address and occupation.

Andrew C. Spahl. That's spelled S-p-a-h-l. 1445 Farmdale Road, St. Paul 55118.

2. What position do you hold with Theodore Hamm Company, St. Paul, Minnesota?

Vice President of Manufacturing.

3. Please state how long you have held that position.

I'v been with the company since 1957. Vice President of manufacturing since 1969—April 1st.

4. Please state whether or not Theodore Hamm Company produces, bottles and sells a drink product known as: Lime, Right Time, a flavored malt liquor?

Yes, we do, but we don't call it lime. We call it Gold. We don't have any lime on our products. We produce a flavored malt liquor. I am mailing a sample bottle as Exhibit 1 to this deposition. I have affixed my signature to the label, attested by the court reporter.

5. Please state whether or not such drink was being bottled for sale in the State of Oklahoma in 12 ounce bottles during 1971 and 1972 with a gold colored cover over the mouth of the bottle across which was printed the word: Oklahoma.

That is correct.

6. If your answer to the preceding interrogatory is in the affirmative, please state the alcoholic content of a 12 ounce bottle of said drink bottled for the State of Oklahoma during that time.

The 12-ounce bottle was not to exceed 3.2 alcohol by weight.

7. Do you have production controls for the purpose of insuring that the alcoholic contend of each bottle does not exceed the percentage which you have stated in your answer to the interrogatory immediately preceding this one.

Yes, we do.

(Signature line and jurat omitted.)

In the United States District Court
Western District of Arkansas

(Title omitted in printing)

SEPARATE ANSWER OF S. L. INLOW

(Filed May 1, 1972)

Comes the Defendant, S. L. Inlow, and files herewith his separate answer to the Amendment to Complaint and states:

1. The Defendant denies that this Court has jurisdiction of the asserted cause of action against this defendant contained in the Amendment to Complaint.

2. This defendant denies the allegations of paragraph 1 of the Amendment to Complaint.

3. This defendant denies the allegations of paragraph 2 of the Amendment to Complaint.

4. This defendant denies the allegations of paragraph 3 of the Amendment to Complaint specifically denying that he has acted with malice toward the Plaintiffs.

5. This defendant states that the action of the Board of the Mena School District was taken under the Authority of the Statutes of the State of Arkansas and that the defendant, as an employee of the Board, had no power or right to vote upon the suspension or expulsion of the Plaintiffs nor does he have the power or right to re-instate the Plaintiffs. Thus, defendant can incur no liability to the Plaintiffs because of the enforcement by the Board of school policies and regulations governing the discipline of students which policies and regulations were enacted by the Board under its Statutory Authority.

6. This defendant specifically pleads privilege in his communications with the Board, his employer.

Wherefore, Defendant, S. L. Inlow prays that the Amendment to Complaint be dismissed.

(Signature and Certificate omitted.)

In the United States District Court
Western District of Arkansas

(Title omitted in printing)

SEPARATE ANSWER OF DUDDY WALLER

(Filed May 1, 1972)

Comes the Defendant, Duddy Waller, and files herewith his separate answer to the Amendment to Complaint and states:

1. The Defendant denies that this Court has jurisdiction of the asserted cause of action against this defendant contained in the Amendment to Complaint.

2. This defendant denies the allegations of paragraph 1 of the Amendment to Complaint.

3. This defendant denies the allegations of paragraph 2 of the Amendment to Complaint.

4. This defendant denies the allegations of paragraph 3 of the Amendment to Complaint specifically denying that he has acted with malice toward the Plaintiffs.

5. This defendant states that the action of the Board of the Mena School District was taken under the Authority of the Statutes of the State of Arkansas and that the defendant, as an employee of the Board, had no power or right to vote upon the suspension or expulsion of the Plaintiffs nor does he have the power or right to reinstate the Plaintiffs. Thus, defendant can incur no liability to the Plaintiffs because of the enforcement by the Board of school policies and regulations governing the discipline of students which policies and regulations were enacted by the Board under its Statutory Authority.

6. This defendant specifically pleads privilege in his communications with the Board, his employer.

Wherefore, Defendant, Duddy Waller, prays that the Amendment to Complaint be dismissed.

(Signature and certificate omitted.)

In the United States District Court
Western District of Arkansas

(Title omitted in printing)

SEPARATE ANSWER
Of Defendants, Jo..a P. Wood, Ed Stevenson, Rachel Goforth, Bob Philpot, Jim Aleshire, Raymond Stroud, Bill Plunkett and Mena Special School District

(Filed May 10, 1972)

Comes the named Defendants and make this their separate answer to the amendment to complaint filed herein, and state the following:

1. The named Defendants allege and state that this Court has no proper or sufficient jurisdiction to hear and entertain the cause of action for damages now asserted by the Plaintiffs in the amendment to complaint filed herein. In this connection the Defendants would state and show unto the Court that at the time of being allowed to file the amendment to complaint the pleadings previously filed by the Plaintiffs had been substantially worked out and the allegations of the Plaintiffs made by the prior pleadings had been substantially litigated, and the issue raised by the prior pleadings filed herein were in substantial effect disposed of. At the time of being permitted to file the amendment to complaint herein, the Plaintiffs were and are in effect simply filing a new lawsuit, and there is no sufficient grounds or foundation for jurisdiction of this Court either alleged on the face of the complaint or present in fact. Specifically, the Defendants would state and show unto the Court that there is no diversity of citizenship involved in this action. There is no sufficient identification of the parties or other allegation to support jurisdiction under 42 U.S.C. 1981 and 1983.

2. The Defendants who file this answer deny all of the allegations of the amendment to complaint filed herein, and state that the same are untrue, and without waiving any of their rights to plead in bar or in abatement submit this their general denial answer.

3. In addition to general denial, the Defendants specifically deny the allegations of paragraph 1, the allegations of paragraph 2 and the allegations of paragraph 3 of the amendment to complaint filed herein.

4. In addition to the foregoing, the named Defendants affirmatively and positively state that all of the actions taken by the named individual Defendants who make this answer were taken by the said individual Defendants in their capacities as members of the Board of Education of Mena Special School District, and as elected officials of the Mena Special School District, and as such are not subject to question or challenge by the Plaintiffs in this forum or any other forum. Further in this connection, the Defendants would state and allege that the Plaintiffs have no legal standing or judicial standing to challenge or question the acts of the individual Defendants as members of the school board of Board of Education of the Mena Special School District. Further answering, the Defendants would state and show that no justiciable issue is presented by the pleading filed by the Plaintiffs herein.

5. That the named individual Defendants herein are "State Officials," and are duly elected representatives, servants and agents of the people of the State of Arkansas, and in particular of the patrons of the Mena Special School District, and that the Court has no jurisdiction nor do the Plaintiffs have any standing to call into question the actions of the named individual Defendants.

6. That the Plaintiffs have remedies at law and in equity, or either of them, which have not been exhausted, and the

Plaintiffs should be required to exhaust remedies available in the State of Arkansas before they may properly bring or maintain this action.

7. That in addition to State judicial remedies available to the Plaintiffs, the Plaintiffs have available to them administrative remedies which have not been resorted to or exhausted, and the Court should not entertain any action on the part of the Plaintiffs in this Court until such time as all remedies, both administrative and judicial, are resorted to and exhausted.

8. That more specifically, and without limiting the applicability of prior or subsequent portions of this answer, the Plaintiffs have available to them the remedy of an action for mandamus, or have had available to them at all times the right of an action for mandamus, in the Courts of the State of Arkansas, and the Defendants herein have been amenable to process in such an action or other judicial remedy which might be chosen or selected by the Plaintiffs, and no action for mandamus or other judicial remedy has been resorted to or commenced by the Plaintiffs in the State Courts of Arkansas or elsewhere, other than this action for damages brought in this Honorable Court.

9. That no exceptional circumstances have been shown or alleged by the Plaintiffs to justify intervention by this Honorable Court. This Court may and should take judicial cognizance of the procedures available to the Plaintiffs, or remedies available to the Plaintiffs, in the State Courts of Arkansas, and abstain from acting to adjust rights and differences between or among the parties in this cause or alleged cause.

10. That the acts done or alleged to be done by the Defendants, John P. Wood, Ed Stevenson, Rachel Goforth, Bob Philpot, Jim Aleshire, Raymond Stroud and Bill Plunkett, even if otherwise actionable, were done by the named Defendants in a quasi-judicial capacity, or by the named Defendants

as quasi-judicial officers, and in their official capacity as members of the Board of Education of Mena Special School District, in which official capacity the said named Defendants are called upon under the law to exercise quasi-judicial powers and authority.

Wherefore, these Defendants pray that the complaint filed herein by the Plaintiffs together with the amendment to complaint filed herein by Plaintiffs be dismissed and that these Defendants have their costs of Court incurred and other relief to which they may show themselves to be entitled.

(Signatures and certificate omitted.)

In the United States District Court
Western District of Arkansas

(Title omitted in printing)

ANSWERS TO INTERROGATORIES

(Filed June 23, 1972)

Comes now, S. L. Inlow, one of the defendants in this cause, and for answer to the interrogatories propounded herein by the plaintiffs would state as follows:

* * * * * * *

7. If you will do so without a Motion to Produce, please attach to your answers to these interrogatories a complete and unabridged copy of the present Mena School Board policy.

Answer: See attached Exhibit "A" for a complete and unabridged copy of present Mena School Board policy.

8. During what year was the rule adopted under which the plaintiffs were expelled in this case?

Answer: 1967.

9. Was the rule originally adopted in the same language which it now reads? If not, please set out in your answer the original language of the rule, and, separately, its language in every form to which it has been amended to the present time, and give the dates of the meetings where any such changes were adopted.

Answer: Yes, the rule was originally adopted in the same language in which it now reads.

10. If you will do so without a Motion to Produce, please attach to your answers to these interrogatories copies of the minutes of the meeting of the School Board where the said rule was adopted and the minutes of every meeting wherein any change has been made to the said rule up to the present date.

Answer: See Exhibit "B" attached hereto as a copy of the minutes of the meeting of the school board where the rule in question was adopted. See Exhibit "B-1" for minutes of meeting where this policy was amended.

11. If you will do so without a Motion to Produce, please attach to your answers to these interrogatories a copy of the minutes of every meeting wherein the subject of expelling the two plaintiffs in this case was considered or discussed whether mentioned in the said minutes or not.

Answer: See Exhibit "C" attached hereto.

* * * * * * * *

23. Has the school board had information from Duddy Waller and Mrs. Curtis Powell or any other source that other members of the Home Ec class drank the punch prepared by the plaintiffs after having been told that it contained an intoxicating liquor?

Answer: The School Board has had information that other members of the class possibly drank the punch prepared by the plaintiffs, and that this was possibly after they had information that the punch contained some intoxicant or alcoholic beverage.

24. Have any of such children been expelled for the balance of the term?

Answer: No.

(Signature line and Certificate of Service omitted.)

Exhibit "A"

* * * * * * * *

3. Suspension

* * * * * * * *

b. Valid causes for suspension from school on first offense: Pupils found to be guilty of any of the following shall be suspended from school on the first offense for the balance of the semester and such suspension will be noted on the permanent record of the student along with reason for suspension.

(1) Immoral conduct

(2) Insubordination

(3) Conduct that would tend to impair the discipline of the school.

(4) The use of intoxicating beverage or possession of same at school or at a school sponsored activity.

(5) Conduct that would tend to harm other pupils

* * * * * * *

Exhibit "B"

MINUTES

Mena School Board

1-10-67

The Mena School Board met in the Board Room at Mena High School, Tuesday evening, January 10, 1967, at 7:30 o'clock with all members present. With Dr. Grace presiding, the following business was transacted:

* * * * * * * *

There were several school patrons present, among them was Mr. and Mrs. Bob Martin who appealed the decision by the school administration to suspend their son Jimmy Martin, for the balance of the semester for drinking beer at a junior high school party. The board listened to the comments of the parents, other patrons and the superintendent and decided this was a matter that should be discussed in closed session since it involved personnel (the parents, student, and administration.) This closed session to convene immediately after the regular session.

* * * * * * * *

Upon adjournment of the regular session the board immediately went into closed session to discuss the problem presented by Mr. and Mrs. Bob Martin. There was considerable discussion of this matter with the board being in complete agreement with the administration that drinking intoxicating beverage at school or at a school-sponsored activity is a most serious offense and if tolerated, would impair the discipline of the entire school. There was deep concern expressed for the boys involved and a desire expressed to do everything possible to assist them in making up credits lost because of the resulting suspension. The board members and the superintendent arrived

at a decision that was felt to be fair to all concerned with as much leniency as possible and still maintain good discipline of the school and was expressed by the following action: Mr. Carver made the motion that the suspension stand and that Jimmy Martin and Jimmy Masters be placed on probation for the next semester and that during this time a plan would be devised whereby they might make up this work and receive credit depending upon the attitude and interest of the parents and students involved. Mrs. Spencer seconded the motion. All members were present and voted yes on this motion.

• • • • • • • •

School policies concerned with student discipline were discussed and adopted upon motion by Mrs. Spencer and seconded by Lowrey Embry. A copy of the policies adopted are attached and become a part of these minutes.

Exhibit "B-1"

MINUTES

Mena School Board

3-10-70

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There was discussion of the abusive use of drugs among students in various parts of the country and the need to discourage such a practice. Dr. Wood made the motion to adopt a drug policy as follows and to add it to the board policy under **Pupil Personnel Policy** as item C.3.b.6. of page 26:

> The use or possession of narcotics, hallucinogens, amphetamines, barbiturates, or other drugs subject to abuse (includes all drugs under H.R.2) at school or at a school

> sponsored activity. Sniffing glue or other similar compounds is considered in the same classification as the above drugs in applying this penalty.

This motion was seconded by Dr. Grace and carried.

• • • • • • • •

Exhibit "C-1"

MINUTES

Mena School Board

2-18-72

9:30 PM

The Mena School Board met in special session on the above date for the purpose of considering a disciplinary problem. Members present were: Ed Stevenson, Raymond Stroud, Rachel Goforth, Jim Aleshire, Bob Philpot and Bill Plunkett. Superintendent S. L. Inlow, High School Principal, P. T. Waller, home economics teacher, Gladys Powell, and Jim Barton an interested patron were also present.

Mr. Stevenson called the meeting to order and asked Superintendent Inlow to explain the purpose of the meeting. He explained that there was a disciplinary problem involving three high school girls who had put an alcoholic beverage into punch served to a group of FHA girls and some of their mothers. He then asked Mrs. Powell to explain the details since she was most familiar with what had happened. Mrs. Powell explained what had happened and asked that the board be as lenient as possible with the girls. Mr. Waller concurred with what Mrs. Powell had reported and recommended that the girls be suspended but that

the suspension not be put into effect depending upon the good behavior of those involved.

Mr. Inlow was making a statement agreeing with what Mr. Waller had recommended when there was a phone call received concerning further behavior of one of the girls involved. After returning from answering the phone he reported the nature of the information received, whereupon Mr. Waller withdrew his recommendation and Mr. Inlow stated that he would have no recommendation in the case.

Mr. Stevenson asked the board memoers if anyone cared to make a motion to grant leniency in the case or to change the application of the policy. There being no such motion, he ruled that the policy had been upheld and that the three girls: Jo Wall, Peggy Strickland, and Virginia Crain, be suspended from school for the remainder of the semester as required by board policy.

• • • • • • • •

Exhibit "C-2"

MINUTES

Mena School Board

3-2-72

7:30 PM

The Mena School Board met in special session on the above date for the purpose of hearing Peggy Strickland, Virginia Crain, and Jo Wall, students of Mena High School, their parents, and their attorneys, concerning the above named students being expelled from school and also to hear a report from a committee concerning selling land to parties interested in a vocational tech-

nical school. Members present were Dr. Wood, Mr. Stevenson, Mr. Stroud, Mrs. Goforth, Mr. Philpot, Mr. Plunkett, and Mr. Aleshire. Others present were Peggy Strickland, her parents, Mr. and Mrs. Virgil Justice, Virginia Crain and her mother, Mrs. Doris Crain, their counsel, Mr. Ben Core, and other interested parties. The meeting place was changed from the board room to the high school library in order to accommodate all parties interested.

Mr. Stevenson presided and declared a quorum present and opened the meeting by calling upon Mr. Joe Hardegree, counsel for the board, who made a statement of background information and of facts established by the board at its meeting February 18, prior to the expulsion of the three students.

Mr. Stevenson then called upon the girls, their parents, or their attorney to present their case. Mr. Core made some introductory remarks and identified himself as an attorney representing Peggy Strickland and Virginia Crain. He then proceeded to review the case by questioning the girls as to what had happened. The girls went into details in response to questions by their attorney with comments from time to time from their parents.

After all parties were given opportunity to make whatever statements they desired that might have a bearing on the case, Mr. Stevenson asked if anyone cared to make a motion to revoke or change the previous action of the board taken on February 18. There being no motion to this effect, he then asked if there was a motion to sustain the previous action. Mr. Aleshire moved that the board sustain the action previously taken and that the girls remain expelled from school for the balance of the semester. The motion was seconded by Dr. Wood and carried unanimously.

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Exhibit "C-3"

MINUTES

Mena School Board

3-14-72

• • • • • • • •

Mr. Stevenson opened the meeting with a few remarks concerning the recent expulsion of three students and then called upon Mr. Hardegree to make a report to the board concerning the case. Mr. Hardegree reported that Mr. Bea Core, attorney for the plaintiffs, had filed an amendment to the original motion in federal district court to include a damage suit against the school district, against each board member individually, and against the high school principal and superintendent individually.

• • • • • • • •

The board discussed school discipline and were in agreement that the principals, with approval of the superintent, should administer board policies concerning suspensions and expulsions of students and that in all cases parents of students affected must be notified immediately of the action taken with reasons for such action and informed of their right to appeal to the board.

Exhibit "C-4"

MINUTES

Mena School Board

4-11-72

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Mr. Virgil Justice was recognized by the chairman and expressed apologies to the Board for the behavior of Peggy Strick-

land and Virginia Crain which resulted in their expulsion from Mena High School February 18, 1972. He further appealed for a reconsideration of this expulsion. At this time, Mr. Stevenson read an excerpt from a hearing in Federal Court in Ft. Smith, Arkansas, on April 7, 1972. Mr. Forrest Ogden made a motion to reinstate Peggy Strickland, Virginia Crain, and Jo Wall in Mena High School. Mr. Aleshire seconded the motion; it did not carry.

• • • • • • • •

In the United States District Court
Western District of Arkansas

(Title Omitted in Printing)

ANSWERS TO INTERROGATORIES

(Filed June 23, 1972)

Comes now S. L. Inlow, one of the Defendants in this action, and for answers to interrogatories filed herein by Plaintiffs and served upon Defendants would state as follows:

• • • • • • • •

Interrogatory No. 2. In the responses as aforesaid, in response to request No. 5, you have denied that no witness appeared before the Board purporting to have personal knowledge of the type of beverage acquired by the Plaintiffs nor of its alcoholic content, if any. Please give the names and addresses of all persons who appeared before the Board at the special meeting of February 17, 1972 purporting to have such personal knowledge.

Answer: Edward Stevenson, a member of the Board, purported to have knowledge of the type of beverage in question,

which knowledge had been acquired by him prior to the meeting of the Board. This is Edward Stevenson, 1207 Texas Street, Mena, Arkansas 71953.

• • • • • • • •

Interrogatory No. 4. In the responses aforesaid, in response to request No. 7, you have denied that no person has ever appeared as a witness before the School Board purporting to know what the alcoholic content of the mixture was when brought on the campus by the girls. Please state the names and addresses of all persons who have ever appeared as witnesses before the School Board purporting to know what the alcoholic content of the mixture was when brought on the campus by the girls.

Answer: Edward Stevenson, 1207 Texas Street, Mena, Arkansas, apparently obtained information prior to the meeting of the School Board that the beverage brought onto the campus by the girls was an alcoholic beverage and intoxicating in its effect. As to the alcoholic content of the mixture produced by the girls, this would apparently be only within their knowledge.

Interrogatory No. 5. In the responses aforesaid, in response to request No. 8, you have denied that no person appeared before the School Board at the February 17, 1972 meeting having personal knowledge that the mixture brought on the campus by the Plaintiff was intoxicating, even in the slightest degree. Please state the names and addresses of all persons who appeared before the School Board at the February 17, 1972 special meeting having personal knowledge that the mixture brought on the campus by the Plaintiffs was intoxicating even in the slightest degree.

Answer: Edward Stevenson and perhaps other members of the school Board, who had perhaps made inquiries of their own concerning the nature of the beverage in question, and

who may have had prior knowledge of the nature of the beverage in question.

Interrogatory No. 6. In the responses aforesaid, in response to request No. 9, you have denied that the mixture brought on the campus by the Plaintiff was made up of two bottles of Lime, Right Time, flavored malt liquor, a product of Theodore Hamm Company, 720 Payne Avenue, St. Paul, Minnesota 55165. You have further denied that the said two bottles were twelve ounce bottles and prior to being brought on to the campus were mixed with sixty ounces of a non-alcoholic soft drink for a total mixture of eighty-four ounces of liquid. Since you have denied the foregoing facts, please state what the mixture was which you claim to have been brought on the campus by the girls and give the names and addresses of all witnesses to support such facts.

Answer: This Defendant and the School Board have received proof that an alcoholic or intoxicating beverage was brought onto the school campus. The children in question state that it was two bottles of the type of alcoholic beverage mentioned in this interrogatory. This Defendant does not have personal knowledge as to whether it was one bottle, two bottles or more. The Board was apparently satisfied that an alcoholic and intoxicating beverage was brought onto the school premises, and have no claim as to what mixture was produced by the students in question from the alcoholic beverage.

• • • • • • • •

Interrogatory No. 15. If you will do so without a motion to produce, please attach a copy of the School Board minutes for the special meeting of March 24, 1972.

Answer: See copy of School Board Minutes for special meeting of March 24, 1972 attached hereto as Exhibit "A".

(Signature line and Certificate of Service Omitted)

Exhibit "A"

MINUTES

Mena School Board

3-24-72

The Mena School Board met in the Mena High School Library on the above date at 7:00 pm for the purpose of dealing with a disciplinary problem involving Mike Burnette, Bill Ansley and Jeff Brown, all high school students, to hear recommendations of the superintendent, and to hear parents of the above mentioned students. All board members were present including Mr. Forrest Ogden, recently elected member. Also present was Mr. S. L. Inlow, Suprintendent of Schools, Mr. P. T. Waller, Sr. High School Pirncipal, Mr. Curtis Powell, high school teacher, Mr. Tom Freeman, representing the Mena Star, Mr. Jack Reeves, representing Radio Station KENA, the above mentioned students, their fathers, and Gary Ham and his father.

With Mr. Ed Stevenson presiding, the following business was transacted; Mr. Inlow was called on to relate the occurrences leading to the administrative expulsion of these three boys for the balance of the current semester because of drinking beer during the lunch period on March 23. Mr. Burnett, Mr. Brown, and Mr. Shinn (stepfather of B. Ansley) made statements, Mr. Waller and Mr. Powell were called on for statements, and members of the board made statements and asked questions.

Mr. Philpot moved to uphold the administrative suspension of the three boys. Motion died for lack of second.

Mr. Ogden moved that the boys be suspended from Mena High School for a period of two weeks. Mr. Plunkett seconded this motion and it carried six to one with Mr. Philpot abstaining.

* * * * * * *

In the United States District Court
Western District of Arkansas

(Title omitted in printing)

AFFIDAVIT OF S. L. INLOW

(Submitted with Motion for Summary Judgment
by Defendants Inlow and Waller)

(Filed July 6, 1972)

State of Arkansas }
County of Polk } ss.

My name is S. L. Inlow. Until my resignation at the end of the 1971-72 school year I was Superintendent of Schools of the Mena Special School District. I was employed as Superintendent of the Mena Special School District for 6 years prior to my resignation. Duddy Waller was Principal of Mena High School during the 1971-72 School District.

In 1967 the Board of Education of Mena School District adopted administrative policies to govern the Mena Schools. Under the provisions of said policies the Superintendent of Schools was designated as executive officer of the Board of Education and was charged with the responsibility of implementing the policies of the Board of Education but "shall have no vote" in matters upon which the Board voted. The policies also provide that "the Board may accept, modify, or reject recommendations made by the superintendent."

Duddy Waller and I were employed by regular teacher's contract as approved by the Arkansas Department of Education.

On Friday morning, February 18, 1972, Peggy Strickland, Virginia Crain, and Jo Wall went to Mr. Waller's office and admitted that they had put malt liquor in some punch served

at a school activity. Jo Wall told Mr. Waller that they had put two bottles of malt liquor in the punch and that they were sorry they had done it; that it was meant as a prank or joke and they had not intended to hurt anyone. At first they said "we had it left over after a party and hid it behind a tree near the drive-in theater" but later admitted they had gone to Oklahoma and brought the malt liquor to put in the punch. Mr. Waller reported the incident to me immediately upon having heard the confession of the girls. He and I agreed that we had no other choice but to temporarily suspend the girls until the Board met to act upon the case. Mr. Waller told me he had told the girls that he would take this up with the Board of Education. He and I agreed that he would call the Board and report the incident to them, which he did. I called the acting President of the Board, Mr. Ed Stevenson, and asked him to call a meeting of the Board as soon as possible so that, in the event the girls were readmitted to school, they would miss as little school as possible. The Board was called into special session that Friday night, February 18, 1972. Mr. Waller asked the Board to be lenient with the girls. I made no recommendation to the Board either at that time or any time subsequent. My sole duty was to report the facts to the Board and then let he Board exercise its own judgment based upon the facts. During the meeting of the Board I was called to the phone to talk to the husband of the Home Economics teacher, who is also a teacher. I was informed that one of the girls, said to be Jo Wall, had just cursed another girl following a basketball game accusing her of telling on them for spiking the punch. This girl, presumable Jo Wall, had allegedly told the other girl that she would get even with her even if she had to lie about her. Since the information as to the name of the girl who made the threats was pure hearsay I simply reported to the Board that it had been reported to me through a teacher that one of the girls had threatened a girl for telling on the girls. When I reported the phone call to the Board Mr. Waller said "I withdraw my recommendation." The Board had not asked Mr. Waller for

his recommendation. He had asked leniency for the girls on his own initiative. I made no recommendation in the case. It was not my place to make a recommendation since the matter was Board policy. Of course, I did not vote on the action taken by the Board since I am not permitted to vote nor is Mr. Waller. After I verified that the girl who allegedly threatened another girl was actually Jo Wall I reported her name to the members of the Board. The Board was all informed of the name of the girl prior to the hearing on March 2.

The Board voted to suspend the girls until the expiration of the school term.

On March 2, 1972, the School Board met in special session for the purpose of hearing Peggy Strickland, Virginia Crain and Jo Wall. Peggy Strickland and her parents and Virginia Crain and her mother were present at the meeting. They were represented by Mr. Ben Core, their legal counsel. Mr. Core reviewed the case by questioning Peggy Strickland and Virginia Crain as to what had happened. The girls went into details under the guidance of Mr. Core. All parties were given full opportunity to make whatever statements they desired that might have a bearing on the case. After hearing all of the statements the Board unanimously sustained it previous action. Neither Mr. Waller nor I made any recommendation since the matter was in the hands of the School Board.

On March 11, Mr. Virgil Justice appeared before the Board on behalf of Peggy Strickland and Virginia Crain and appealed for reconsideration of the expulsion of the girls. A motion was made to reinstate the girls but it did not carry. Neither Mr. Waller nor I participated. Mr. Waller submitted his resignation as Principal effective that day which was accepted. His resignation was not connected with the incident of the expulsion of the three girls but was for personal reasons.

On January 10, 1967, two junior high students had been suspended for the balance of the semester for drinking beer at

a school sponsored activity. On October 12, 1971, a senior high boy, who was President of the Student Council was suspended for the semester for possession of beer at a high school dance. In both of these cases the Board followed its policies and I did not participate since I had no vote.

Neither Mr. Waller nor I had ever had any difficulty with either of the girls. In fact I knew them by sight but just as any other students.

(Jurat and signature omitted.)

In the United States District Court
Western District of Arkansas

(Title omitted in printing)

State of Arkansas }
County of Polk } ss.

AFFIDAVIT

(Submitted in Opposition to Motion for Summary Judgment)

(Filed July 24, 1972)

My name is Peggy Strickland. Prior to February 18, 1972 I was a student at Mena High School. In the day prior thereto, to wit, February 17, 1972, Mrs. Curtis Powell, my Home Ec teacher, had questioned Virginia Crain and I concerning an incident of spiking the punch at a Home Ec party some ten days prior to that. Virginia and I first denied that we had had anything to do with such an incident but Mrs. Powell told us that she intended to handle the matter herself and that it would not go any higher than her and that if we did have anything to do with it that we should tell her about it. After these assurances we did tell and admit to Mrs. Powell that we had been involved. She stated that our punishment would be that we would not be permitted to attend the state Home Ec meeting. We thought the matter was closed.

The next morning Mrs. Powell called us back for another discussion and told us that she could not keep her word of the previous day and that she was going to have to report the incident to the principal and that it would be better for us if we would go down with her and tell the principal, Mr. Duddy Waller, of our involvement in it. Since we had already told Mrs. Powell, we really had no choice. We went down with her and told Mr. Waller. We also apologized to him at that time and assured him that we would not do that anymore or anything like it. Mr. Waller praised us for having admitted our involvement and said that he would talk to us later. He did call us back later in the day and told us that he was expelling us for one week, that we could tell our parents if we desired to do so but that if we did we should also tell them that they should not be contacting any members of the School Board, that the School Board was going to meet that same evening and discuss the case and that he, Mr. Waller, was going to recommend to the Board that they be lenient on us.

By reason of the things which Mr. Waller said to us I cautioned my parents very strictly that they should not call any member of the School Board and they did not. Neither were my parents ever contacted by any member of the School Board nor by either Mrs. Powell, Mr. Waller or Mr. Inlow.

The next morning, which was February 19, 1972, a Saturday morning, Mr. Waller called for me by phone at my residence and I talked with him. He told me that the School Board had met the previous evening and that if I desired to discuss the results of the meeting I could do so in his office, and I could bring my parents if I wanted to.

I told my parents of the conversation and they and I went immediately to the office of Mr. Waller at the Mena High School. We were accompanied by Virginia Crain and her mother and Jo Wall. Also present were Mr. Inlow and Mrs. Curtis Powell, and Mr. Waller.

My parents asked Mr. Inlow to call another special meeting of the School Board in order that we three girls and our parents could meet with them and talk about what had happened and what the punishment should be. Mr. Inlow said that he did not have the authority to call another meeting of the School Board. He was asked if it was not true that he was the executive secretary of the Board and he admitted that he was. He was asked if it was not true that he had called the meeting of the previous evening which was also a special meeting and he admitted that he had. He then changed his reason for not calling another special meeting to say that the rule under which the School Board had acted was mandatory, that it was not possible to have any expulsion for less than the balance of the school term and that there was no need to call the School Board back into special session because the Board had done the only thing that they could do under the rule. In spite of our repeated requests for some meeting with the Board Mr. Inlow refused to consider another meeting of the Board. We left the principal's without any favorable indication at all that we would ever get to meet with the School Board.

For the next few days efforts were made by my parents and by the pastor of our church, Brother Jordan, to obtain a special meeting of the Board through personal contacts with the individual members of the Board and their officers. All of our efforts were futile and invariably the reason given was that the rule under which they had acted was mandatory and they had no other choice than to expel us for the balance of the term. Finally, in despair my parents employed an attorney.

I have read a copy of Mr. Inlow's affidavit of June 28, 1972. He uses the word "suspend." Before this he always used the word "expel." On his page 3 he implies, if he does not say, that the Board knew that the only girl involved in the incident reported by Mr. Curtis Powell was Jo Wall when they expelled all 3 of us. This is not true.

(Signature and Jurat omitted)

In the United States District Court
Western District of Arkansas

(Title omitted in printing)

ORDER

(Filed July 21, 1972)

On this July 21, 1972, upon consideration of Motion for Partial Summary Judgment filed July 6, 1972, by defendants S. L. Inlow and Duddy Waller, the Response of plaintiffs, together with briefs submitted by the parties, the court is of the opinion that said motion should be overruled.

It Is, Therefore, Ordered and Adjudged that the Motion for Partial Summary Judgment be, and hereby is, overruled.

It Is Further Ordered that this case be, and hereby is, set for trial to a jury on Thursday, August 17, 1972, at 9 a.m. or as soon thereafter as the case can be reached.

(Signature omitted)

In the United States District Court
Western District of Arkansas

(Title omitted in printing)

COURT'S INSTRUCTIONS TO THE JURY AT THE TRIAL[2] IN AUGUST 1972[3]

(Partial)

No. 14

In the case at bar, each plaintiff has the burden of proof to prove that her right to attend school at Mena has been violated wrongfully and with malice by the Defendants from whom she seeks damages.

No. 22

You are instructed that the Mena School Board had the right to promulgate as a part of its statement of policy the declaration concerning intoxicants and the matter of the reasonableness or unreasonableness of this declared is not properly in question in this case.

Furthermore, the School Board Members had the right to enforce the same.

You are instructed that the teachers and school administrators had the right to enforce the school policy.

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[2] As of the time of the decision later rendered by the Court of Appeals, the testimony presented during the three day trial to the jury had not been transcribed. On June 13, 1974, that transcript was filed with the record then in custody of the United States District Clerk.

[3] Other pertinent instructions are set forth in the District Court's Memorandum Opinion which is reproduced in the Petition for a Writ of Certiorari as Appendix V at A. 15, 21-23.

No. 25

If you find that in fact the malt liquor "Right Time" is not and was not an intoxicant as that term is used in the declaration of Mena school policy; but you find that the Plaintiffs and the school authorities in good faith considered it to be, then you are instructed that the good faith of a particular Defendant in discharge of duties as a school board member or school administrator is a full and complete defense in this case as to that particular defendant.

The intelligence and quality of judgment of each of the defendants is not in issue in these cases, and

It is a well known fact that hindsight is often better than foresight, so

If you find from a preponderance of the evidence that an incorrect decision was made by any defendant in this case, the fact that the decision is incorrect or that a more sensible or more intelligent decision would have been more desirable is not necessarily controlling, and

If you find that the particular Defendant was acting in good faith, then the good faith of the Defendant is a total defense in this case.

Defendant School Board Requested Instruction No. G (As amended)

Before the jury can find for either Plaintiff against any Defendant herein, the jury must find from a preponderance of the evidence in this case that the particular Defendant committed an intentional, purposeful discrimination with malice toward that particular plaintiff.

In the United States District Court
Western District of Arkansas

(Title omitted in printing)

ORDER

(Filed August 21, 1972)

On this August 21, 1972, come the parties hereto by their respective counsel, and comes the jury heretofore impaneled on August 17, 1972, for the trial of this cause and trial thereof resumes.

All of the evidence having been concluded on Saturday, August 19, 1972, and deliberation commenced on that day but not concluded, the jury is called in open court, and all members answering present to the roll call, the jury retires to the jury room to resume its deliberation.

After further deliberation, the jury announces to the court through its foreman that it is hopelessly deadlocked, and that further deliberation would be fruitless. All members of the jury being in agreement with the foreman, and the court being of the same opinion,

It Is Ordered and Adjudged that a mistrial be and is declared in this cause, and the jury is discharged from further consideration of the case.

(Signature omitted.)

In the United States District Court
Western District of Arkansas

(Title Omitted in Printing)

MOTION
For Directed Verdict and Motion for Judgment Notwithstanding Verdict or Lack of Verdict

(Filed August 24, 1972)

Comes now the Defendants, Mena Special School District and its Board of Directors and for their Motion for Directed Verdict and Motion for Judgment Notwithstanding Verdict or Lack of Verdict would state and show unto the Court as follows:

1. That the Defendants moved for a directed verdict at the close of all the evidence in the case and that motion was denied and overruled by the Court.

2. That the jury deliberating on the evidence in this case was unable to reach a verdict and consequently was discharged by the Court.

3. That pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, the Defendants herein are entitled to a judgment on their motion for a directed verdict presented to the Court at the close of all the evidence on the following grounds:

(a) That the evidence presented by the Plaintiffs does not state a cause of action on which relief can be granted.

(b) More specifically, malice on the part of the Defendants which was a necessary element of the Plaintiffs' case was not shown as to any Defendant individually nor as to the Board of Directors acting as a whole. Further stat-

ing, the Court instructed the jury that in order to find for either Plaintiff against any Defendant, the jury must find that the particular Defendant committed an intentional, purposeful discrimination with malice toward that particular Plaintiff.

(c) That the defense of good faith as instructed by the Court is a complete defense as to these Defendants in that there was nothing shown in the record that the Defendants acted with anything except the utmost good faith.

(d) That in the absence of malice on the part of the Defendants and the Defendants acting only in the utmost good faith, there is no issue remaining that would support a cause of action against any of these Defendants in that the Court instructed the jury that the reasonableness or unreasonableness of the policy of the Mena School Board regarding intoxicants was not an issue to be determined or questioned by the jury.

(e) That the Plaintiffs did not exhaust the judicial and administrative remedies available to them.

(f) That the Plaintiffs did not show that they were in a class that was being systematically discriminated against.

(g) That the Plaintiffs do not have legal capacity to sue the Mena Special School Board in a case of this type.

(h) That the Court has no jurisdiction of the subject matter herein by reason of the fact that there is no diversity of citizenship.

(i) That the Court has no jurisdiction of the person of the Defendant by reason of the fact that the School Board members were acting in a quasi judicial capacity and consequently are not liable.

Wherefore, these Defendants pray this motion for judgment on their motion for a directed verdict made at the close of all the evidence in the case be granted and that this case be finally disposed of in favor of the Defendants as required by the points of law and fact enumerated in this motion and the supplemental brief attached hereto.

(Signatures and certificate omitted.)

In the United States District Court
Western District of Arkansas

(Title omitted in printing)

MOTION
Of Defendants S. L. Inlow and Duddy Waller for Judgment in Accordance With Their Motions for Directed Verdict

(Filed August 25, 1972)

The defendants, S. L. Inlow and Duddy Waller, pursuant to the provisions of Rule 50(b) of the Federal Rules of Civil Procedure move the Court for judgment for defendants in accordance with their Motions for Directed Verdict made to the Court at the conclusion of the plaintiffs proof and at the conclusion of all the evidence of all parties and for grounds state:

1. The jury in this case failed to reach a verdict and after considering the case until Monday afternoon, August 22, 1972, were discharged by the Court. Had the jury reached a verdict for the plaintiffs against these defendants there was not sufficient substantial evidence to have sustained the verdict under the law of this case as reflected by the Court's instructions.

2. The plaintiff failed to prove by any substantial evidence that these defendants acted with malice toward the plaintiffs.

3. The plaintiff failed to prove by any substantial evidence that these defendants did not believe that their actions taken in the case were not lawful and right.

4. The evidence shows conclusively that these defendants did not promulgate the regulation forming the basis of the complaint in this case, nor did they have the right to vote upon its adoption.

5. The evidence shows conclusively that neither defendant had a vote upon the question of the expulsion of the plaintiffs for the remainder of the school term.

6. The evidence shows conclusively that the defendant Duddy Waller's only action regarding suspension of the plaintiffs was to suspend the girls for a period of 14 days (10 school days) which period of suspension was conceded by the plaintiffs and their parents to have been a reasonable period.

7. The evidence shows conclusively that the only facts presented to the School Board by defendant Waller relating to the girls violation of the school district's regulation against bringing intoxicated beverages upon the school property were the facts furnished to the defendant Waller by the plaintiffs themselves.

8. The evidence shows conclusively that the defendant Inlow made no statement of the facts to the School Board concerning the plaintiffs actions but referred to Mr. Waller and Mrs. Powell the explanation to the Board as to the statements made to them by the plaintiffs and their co-actor Jo Wall.

9. The evidence shows conclusively that defendant Waller was asked by the plaintiffs to go to the School Board and plead with the Board for leniency for them and to not inform their parents of their actions. Defendant Inlow did not present any facts to the Board. Defendant Waller cannot be held liable to

the plaintiffs for a money judgment for not notifying plaintiffs parents of plaintiffs request that they go to the Board for them when he did so specifically at plaintiffs' request and plea.

10. The facts show conclusively that defendant Inlow made no recommendation to the Board for expulsion or suspension.

11. The facts show conclusively that defendant, Duddy Waller, at no time recommended to the Board that the plaintiffs be expelled for the remainder of the term. Waller did not attend the March 2 hearing nor any subsequent hearing.

12. The facts show conclusively that the only action taken by Waller and Inlow was to withdraw a recommendation that the regulation not be enforced against the plaintiffs. As a matter of law a school teacher is under no legal obligation to recommend to a Board that it not enforce its policies or regulations.

13. The plaintiffs failed to show by any evidence that the telephone call of February 18, 1972 to the Board while it was in session in any way influenced the decision of the Board not to apply its regulation to the plaintiffs.

14. There is no question in this case of denial of a due process hearing in view of the March 2 and subsequent hearings.

Wherefore the defendants, S. L. Inlow and Duddy Waller, pray that this Court receive this Motion and upon consideration thereof enter its Judgment dismissing the Complaint as to these defendants.

(Signatures and certificate omitted.)

In the United States District Court
Western District of Arkansas

(Title omitted in printing)

RESPONSE BY PLAINTIFFS TO MOTIONS BY DEFENDANTS

(Filed September 11, 1972)

Comes the plaintiffs herein and for their joint response to the two motions filed by the defendants, one by the defendants, S. L. Inlow and Duddy Waller, and another by the remaining defendants, subsequent to the jury being discharged, state:

1. The plaintiffs admit that the jury was discharged without having reached a verdict in this case but the plaintiffs deny each and every other allegation contained in the motion of S. L. Inlow and Duddy Waller.

2. The plaintiffs deny each and every allegation contained in the motion filed by the remaining defendants.

3. Plaintiffs further state that the Court erred in several instructions given by the Court to the jury but those errors can be corrected upon a retrial of the case.

Wherefore, plaintiffs pray that the motions of the defendants be denied and that the case be rescheduled for an early trial.

(Signatures and certificate omitted.)

In the United States District Court
Western District of Arkansas

(Title Omitted in Printing)

ORDER[4]

(Filed September 29, 1972)

The above styled cause was tried to a jury on August 17, 18, 19 and 21, 1972. The jury was unable to agree on a verdict, a mistrial was declared and the jury was discharged from further consideration of the case. In due time each defendant filed a motion for judgment in his favor in accordance with his motion for a directed verdict made during the trial. Upon consideration of said motions, the court has prepared and filed its opinion and in accordance therewith,

It Is Ordered and Adjudged that said motions be and they are granted, and the complaint in this cause as to the claims of each plaintiff is dismissed with prejudice.

It Is Further Adjudged that the defendants shall recover from plaintiffs all their costs herein expended.

This September 29, 1972.

(Signature Omitted)

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[4] The District Court's Memorandum Opinion is set forth as Appendix V to the Petition for a Writ of Certiorari (A. 15).

In the United States District Court
Western District of Arkansas

(Title Omitted in Printing)

JOINT MOTION OF PLAINTIFFS FOR NEW TRIAL

(Filed October 6, 1972)

Now come the plaintiffs herein pursuant to Rule 59 and jointly file this Motion for New Trial with respect to the Order entered against them on or about September 29, 1972, and moves the Court to set aside the Order entered in favor of the defendants and grant these plaintiffs a new trial with respect to all issues for the following reasons, to-wit:

1. The Court erred in refusing to grant to these plaintiffs the temporary relief prayed by the plaintiffs at the hearing held by this Court on March 7, 1972, and erred in failing to order reinstatement of the children in school at that time pending the later trial of the case on the merits;

2. The Court erred in failing to hold the rule of the Mena School Board to be void on its face by reason of the Constitutional objections made to it by the plaintiffs;

3. The Court erred, by its instructions, in requiring the plaintiffs to prove malice on the part of the defendants before any relief whatever could be granted. In the order dismissing the case the Court erred in relying upon that rule for the evaluation of the proof submitted by the plaintiffs.

4. The instructions of the Court concerning the requirement of the proof of malice, the availability to the defendants of the defense of good faith, and the reasonableness of the rule promulgated by the school board, were erroneous and constituted an invalid basis for the evaluation of the evidence

in determining whether or not verdicts should be directed for the defendants and in determining whether or not their motions for judgment notwithstanding no verdict should be sustained. The Court erred in relying upon such instructions for that purpose.

5. The Court erred in holding that the defendants can deny these plaintiffs their constitutional rights so long as such denial is made in good faith and without malice.

6. The Court erred in holding that no defendant was liable for any of the relief claimed on the ground that "the action of a defendant would have to be a wrongful act done intentionally without just cause, and even then the good faith of a defendant is a complete defense".

7. The Court erred in submitting the case to the jury as one for damages for malicious conduct only and in evaluating the proof for purposes of ruling on the defendants' motions on that basis.

8. The Court erred in holding that the plaintiffs could have no relief whatever under any circumstances from the School District by reason of the fact that "a school district is by its nature incapable of malice".

9. The Court erred in treating this case as being only a case for the recovery of damages.

10. The Court erred in failing to give the plaintiffs a trial and a ruling on their suit for injunctive relief and for a declaratory judgment.

11. The Court erred in holding that the plaintiffs' constitutional right to attend a State supported school is not an issue in this case.

12. The Court erred in failing to submit to the jury the factual contention of the plaintiffs that their constitutional rights

had been violated by the failure of the school board to give them notice and an opportunity to be present at the secret meeting at which the plaintiffs were expelled. The Court has erred in failing to give the plaintiffs any trial on that issue as to whether or not the defendants proceeded in a constitutional manner. Early in the proceedings in this case the Court fairly well expressed itself to be of the opinion that the defendants had not proceeded in a constitutional manner but the Court has now terminated the case without ever giving the plaintiffs a trial on that issue and in so doing, has erred.

13. The Court erred in holding that Arkansas Statutes Section 80-1812 gives immunity to school directors for actions denying constitutional rights of citizens and if such construction of such Statute is correct, the Court erred in not holding the same to be unconstitutional.

14. The Court erred on page 13 of its opinion in holding that each plaintiff had admitted a violation of the school policy. This finding is not supported by any evidence.

15. The Court erred in its finding on page 3 that the girls (plaintiffs) freely admitted "they had added two 12 oz. bottles of a flavored malt liquor beverage called "Right Time" to one and a half gallons of punch at a school function held on February 7, 1972, for the purpose of "spiking the punch."

16. The Court erred in its finding on pages 3 and 4 of the Opinion as follows:

> "It (the School Board) also made provisions to its School Counselor that the girls would follow a course of instruction including some correspondence course in English from the University of Arkansas that would enable the girls to graduate with their class if they did the required work."

17. The Court erred in this statement on page 4 of the Opinion:

> "The plaintiffs then amended their Complaint and alleged as follows: . . . ."

18. The Court erred in its finding as follows:

> "The plaintiffs themselves concede that they violated the school policy, but that suspension for the remainder of the semester was too severe a penalty."

Wherefore, plaintiffs pray that the Court set aside the Memorandum Opinion and Order of September 29, 1972, and that the plaintiffs be granted a new trial upon all issues alleged in the Complaint and Amended Complaint.

(Signatures and certificate omitted.)

In the United States District Court
Western District of Arkansas

(Title omitted in printing)

ORDER

(Filed October 20, 1972)

On this October 20, 1972, upon consideration of plaintiffs' motion for a new trial filed in this cause on October 6, 1972 and in accordance with the court's letter of this date,

It Is Ordered that plaintiffs' said motion be and it is overruled.

(Signature omitted.)

In the United States District Court
Western District of Arkansas

(Title omitted in printing)

NOTICE OF APPEAL

(Filed November 17, 1972)

Notice is hereby given by plaintiffs in the above case and appellants herein, that appellants do hereby appeal from the Order of the Court made and entered on the 29th day of September, 1972, and from the Order of the Court made and entered in this cause on October 20, 1972.

(Signatures and certificate omitted.)

JUDGMENT

(Filed October 1, 1973)

United States Court of Appeals
for the Eighth Circuit

No. 72-1774 September Term, 1972

Peggy Strickland, a Minor, by Mr. and Mrs. Virgil Justice, Her Parents and Next Friends; Virginia Crain, a Minor, by Doris Crain, Her Mother and Next Friend,
Appellants,
vs.
S. L. Inlow, Duddy Waller, John P. Wood, Ed Stevenson, Bob Philpot, Jim Ayleshire, Raymond Stroud, Bill Plunkett and Mena Special School District and Rachel Goforth,
Appellees.

} Appeal from the United States District Court for the Western District of Arkansas.

This cause came on to be heard on the record from the United States District Court for the Western District of Arkansas and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that this cause, be, and it is hereby, remanded to the said District Court for action consistent with this opinion.

And it is further ordered and adjudged by this Court that an attorney's fee in the sum of $500.00 be, and is hereby, awarded to counsel for the appellants.

And it is further ordered and adjudged by this Court that costs will be taxed against all appellees except S. L. Inlow, Duddy Waller, and Mena Special School District in this cause in accordance with the opinion of this Court this day filed herein.

August 29, 1973

(Attestation omitted.)

PLAINTIFFS' EXHIBIT 14

FACTS FOUND BY SCHOOL BOARD

1. That Virginia Crain, Peggy Strickland and Jo Wall are students of Mena High School and subject to the governing rules and policies of Mena High School.

2. That on or about February 7, 1972 these three girls were charged with the responsibility of providing refreshments for a school function, being a gathering of students of the Home Economic class and some of their parents, on school premises, being the auditorium building of Mena High School, and being under the direction of Mrs. Curtis Powell.

3. That the three girls in question traveled to Oklahoma, purchased a number of bottles of malt liquor, a beer type beverage, and later went onto school premises with the alcoholic beverage and put two or more of the bottles of the drink into the punch or liquid refreshment which was to be served to members of the class and parents.

DEFENDANT INLOW'S EXHIBIT 8

February 24, 1972

Mrs. Doris Crain
1403 Missouri
Mena, Arkansas 71953

Dear Mrs. Crain:

This is to inform you that you have the right to petition the Mena School Board to reinstate your daughter, Virginia Crain, in the Mena High School.

The next regular session of the board will be March 14, 1972, at 7:30 pm in the board room, which adjoins the office of the superintendent. If you desire to do so, you may be present and petition the board at this time.

Sincerely,

S. L. Inlow,
Superintendent

DEFENDANT INLOW'S EXHIBIT 9

February 29, 1972

Mrs. Doris Crain
1403 Missouri
Mena, Arkansas 71953

Dear Mrs. Crain:

This is to inform you that there will be a special meeting of the Mena School Board for the purpose of hearing parents of the students who were recently suspended from school. This meeting will be held Thursday evening, March 2, 1972, at 7:30 o'clock in the Board Room at Mena High School.

You and your daughter, and counsel if you so desire, are invited to be present at this meeting.

Sincerely,

S. L. Inlow,
Superintendent

PLAINTIFFS' EXHIBIT 19

(MARCH 14, 1972 STATEMENT OF BOARD)

The Board of Education of Mena Special School District makes the following statement with reference to the expulsion from school of three students on February 18, 1972:

No. 1. The Board has made its decision. It was a hard and onerous decision to make, but was based on facts presented in this case, and upon what the Board feels is a fair and consistent application of the governing rules and policies adopted by the Board.

No. 2. In view of the continued interest in this matter, the Board restates that action was taken in this case and in this manner after it was fairly established that the students in question left the school without permission and the students drove some 50 miles on a round trip into Oklahoma and purchased an alcoholic beverage which would be a violation of the public laws "minor in possession of intoxicants" and "possession of untaxed beer," and that they knowingly and wilfully, and by their own admission put the alcoholic substance into a punch and brought it on to school premises.

No. 3. The Board feels that the school policy in question, which prohibits the use and possession of alcoholic beverage on school premises, is a vital and key part of the overall discipline of the Mena Public Schools, and that a failure to fairly and firmly apply and enforce this policy could and would have far-reaching and detrimental effect on the school system.

No. 4. The School Board realizes its continuing responsibility to review and study the school policies, and to make changes where called for in the judgment of the Board, and the Board intends carrying out this responsibility.

(Signature omitted.)

Dombrowski v. *Eastland*, 387 U.S. 82, 87 S.Ct. 1435, 18 L.Ed.2d 577 12
Epperson v. *Arkansas*, 393 U.S. 97 (1968) 13
Freeman v. *Gould Special School District*, 405 F.2d 1153 (8th Cir. 1969) 13
Lau v. *Nichols*, ... U.S. ....., 39 L.Ed.2d 1 (2-18-74) 25
McLaughlin v. *Tilendis*, 398 F.2d 287 (7th Cir. 1968) 14
Monroe v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 12
Murray v. *West Baton Rouge Parish School Board*, 472 F.2d 438 (5th Cir. 1973) 14
Ordway v. *Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971) 16
Pickering v. *Board of Education*, 391 U.S. 563 (1968) 13
Pierson v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 12
San Antonio School District v. *Rodriquez*, ... U.S. ....., 36 L.Ed.2d 16 25
Shelton v. *Tucker*, 364 U.S. 479 (1960) 13
Shock v. *Tester*, 405 F.2d 852 (8th Cir. 1969) 14
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1285

S. L. INLOW, DUDDY WALLER, JOHN P. WOOD, ED STEVENSON, RACHAEL GOFORTH, BOB PHILPOT, JIM AYLESHIRE, RAYMOND STROUD, BILL PLUNKETT, and MENA SPECIAL SCHOOL DISTRICT,

Petitioners,

vs.

PEGGY STRICKLAND, a Minor, by Mr. and Mrs. Virgil Justice, Her Parents and Next Friends; VIRGINIA CRAIN, a Minor, by Doris Crain, Her Mother and Next Friend,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion delivered in the Circuit Court of Appeals is not as yet officially reported but a copy is appended to the Petition for Writ of Certiorari. The opinion was delivered on August 29, 1973, opinion No. 72-1774.

On September 11, 1973 the Petitioners applied to the Court of Appeals and obtained an order extending their time for the filing of petition for rehearing to and including September 19, 1973.

The petition for rehearing en banc was filed September 19, 1973 and was overruled by order entered September 27, 1973.

JURISDICTION

Respondents contend that the Order extending the time allowed the Petitioners for making application for a Writ of Certiorari was improperly granted in this case. Also, the Petitioners have attempted to drop out S. L. Inlow and Duddy Waller as parties between the time of making the application for extension of time for filing Petition for Writ of Certiorari and the time the Petition was filed. Respondents challenge the right of any of the defendants to drop out at that step.

Extension of Time

The mandate of the Court of Appeals was issued on October 10, 1973.

A dissenting opinion relating to the denial of the Petition for Rehearing En Banc was filed by Chief Judge Mehaffy on October 18, 1973. Judge Mehaffy was joined by Circuit Judges Stephenson and Webster.

All of the Defendants, including S. L. Inlow and Duddy Waller, as Petitioners, represented by Herschel H. Friday and G. Ross Smith, filed in this court a pleading styled APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI, addressed to the Honorable Harry A. Blackmun, on December

17, 1973, only nine days prior to the date on which the time for filing a petition for Writ of Certiorari would expire.

An order granting the requested extension of time to and including February 22, 1974, was entered by Justice Blackmun on the date of filing.

Respondents, unaware that the extension of time had already been granted, filed a response to the application for extension of time which was mailed for filing on December 18, 1973. Respondents never received any acknowledgment from the clerk that this pleading was ever received or filed.

On December 20, 1973 the Respondents mailed for filing a MOTION TO REVOKE ORDER EXTENDING TIME. Respondents received notice from the clerk dated January 2, 1974 that the Motion to Revoke was presented to Mr. Justice Blackmun and denied.

The PETITION FOR A WRIT OF CERTIORARI was filed by the Defendants herein on February 22, 1974.

Respondents contend that there was no basis for granting the extension of time. In support thereof, Respondents refer to their pleading styled: RESPONSE TO APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI, hereto attached as Appendix I, and to their BRIEF SEPARATE STATEMENT IN SUPPORT THEREOF, attached hereto as Appendix II. Likewise, Respondents attach hereto as Appendix III a copy of their MOTION TO REVOKE ORDER EXTENDING TIME.

In effect, Respondents contend that it is not contemplated that extensions of time will be granted to Petitioners who wait from September 27, 1973 until December 13,

1973 (the date on which present counsel stated in their APPLICATION FOR EXTENSION OF TIME that they had been employed) in which to change attorneys. That is 77 days. Therefore, Respondents respectfully state that the time for the filing of the Petition for Writ of Certiorari should not have been extended.

Parties

In a footnote on the first inside page of the printed petition the petition states:

> [1]Petitioners are: John P. Wood, Ed Stephenson, Rachael Goforth, Bob Philpot, Jim Ayleshire, Raymond Stroud, Bill Plunkett, members of the Board of Education of the Mena, Arkansas Special School District, and the Mena Special School District.

Until the time of that footnote, the Petitioners included S. L. Inlow and Duddy Waller. It is the contention of the Respondents that no one of the Defendants can purport to drop out of the case in that manner. If notice of intention to drop any of the Defendants had been given at the time the APPLICATION FOR EXTENSION OF TIME FOR FILING A PETITION FOR A WRIT OF CERTIORARI was filed, the Respondents would have had an opportunity to take steps to insure that the portion of the Court of Appeals opinion and order holding in favor of those two Defendants would be brought up also along with the rest of the opinion and order for equal consideration. Respondents resist any petition for writ of certiorari at all, but if one is to be considered, the Respondents contend that it should be considered equally for all of the Petitioners who joined in the application for extension of time for filing of the Petition.

QUESTIONS PRESENTED

Petitioners set out on pages two and three what Petitioners conceive to be the questions presented by this Petition. The first one is stated as follows:

> 1. Whether federal courts have jurisdiction to invalidate, on grounds of insufficiency of evidence, a public school board's decision to suspend a tenth grade student for possession and use of intoxicating beverages at a school function on school premises, where the student presents no claim of deprivation of fundamental constitutional rights of speech, association, religion or equality of race or sex, and where the procedures utilized in effecting the suspension have not been held unlawful?

Several circumstances described in the question do not exist in this case at all. (1) Invalidation was not on the grounds of insufficiency of the evidence. It was on the basis of not requiring any evidence at all. (2) There was no "possession or use of intoxicating beverages etc. . ." (3) The students do present claims of deprivation of fundamental constitutional rights. (4) The procedures utilized were held to be unlawful. Therefore, it is the position of the Respondents that the question as phrased by the Petitioners is not involved in any way in this case. It never has been involved in this case and it is not now involved.

RESPONDENTS' STATEMENT OF FACTS PERTINENT TO THIS PETITION

The pertinent facts as shown by proof included in the appendix filed with the Court of Appeals are that,

on a Friday, February 18, 1972, at a meeting in his office, the Defendant, Duddy Waller, principal of Mena High School, told these two plaintiffs and a third girl, Jo Wall, that they were suspended from Mena High School based on their confession to him that they had participated in spiking the punch at a meeting of a school group, a part of the Home Economics class a few days earlier (A. 41).

Mr. Waller told the plaintiffs and Jo Wall that the School Board would be called into a meeting to consider his action but he did not say when this would happen (A. 40). Later that same day, the defendants Inlow and Waller did contact the individual members of the Board and a meeting was scheduled for later that same evening. A basketball game was to be played at the High School gymnasium that night and the meeting was set up to follow the basketball game. Final arrangements were completed at around 5:30 or 6:30 o'clock P.M. for the meeting (A. 40). No notice of the fact of the meeting nor of the time or place thereof was given either to the plaintiffs or to the parents of the plaintiffs and neither the plaintiffs nor their parents were invited to attend and none of them did attend (A. 40, 48). Plaintiffs and their parents had no knowledge of the Board meeting until the following morning.

Unknown to the plaintiffs, the meeting of the board took place following the ball game and beginning at around 9:30 o'clock that evening. The whole purpose of the board in meeting was to consider the proposed disciplinary action against these two plaintiffs and Jo Wall. It was a called special meeting for that purpose only. At the beginning of the meeting the defendant, S. L. Inlow, introduced Mrs. Curtis Powell, the Home-Ec teacher, and the defendant Duddy Waller, and told the board that these two teachers were familiar with the details and would furnish the information to the Board (A. 49-50). No other witness was present (A. 49). No other person attempted to furnish any information to the board. Mrs. Curtis Powell knew nothing of the incident except what had been reported to her by the children. She had witnessed nothing herself and merely related to the Board that the girls told her they had put an alcoholic beverage in the punch (A. 39). Mrs. Curtis Powell had no knowledge of her own as to whether the drink the children were calling an alcoholic beverage actually was one or not (A. 38, 39).

The only other witness was the defendant, Duddy Waller, and he again merely repeated to the board what the girls had told him. Neither he nor Mrs. Powell had made any independent investigation to determine what the facts were. Neither was familiar with the particular type of so-called "alcoholic beverage" named (A. 39) to them by the girls. Likewise, the board made no investigation of its own as to what type of so-called "alcoholic beverage" had been acquired by the three girls nor as to how much of it they had allegedly placed in the punch (A. 59, 60).

After making their report to the board of the information given them by the children both teachers, Mrs. Curtis Powell and the defendant, Duddy Waller, recommended to the board that the board show any leniency which it felt it could toward the girls (A. 50). At this stage of the proceeding, a telephone call came into the board meeting room and the call was answered by the defendant Inlow. The call was from another teacher (A. 50) of Mena High School, Mr. Curtis Powell, a science teacher, and husband of Mrs. Curtis Powell, the Home-Ec teacher who was appearing as a witness before the board, and Mr. Curtis Powell reported in his telephone call to Mr. Inlow that some person had reported to him, Mr. Powell,

that Jo Wall, one of the three girls then under consideration, had been involved in an altercation earlier that evening, following the basketball game and prior to the board meeting, and apparently while the crowd was leaving the basketball game at the gymnasium, with one of the children who had informed on the plaintiffs and Jo Wall.

Mr. Curtis Powell had not witnessed such altercation himself but merely had been told about it by someone else, and Mr. Curtis Powell thought it was information which the board should have in considering the punishment appropriate for the two plaintiffs and Jo Wall. Mr. Curtis Powell knew that the board was having its meeting then for that purpose because he knew that his wife was one of the teachers appearing before the board as a witness against the three girls.

After receiving this information from Mr. Curtis Powell, and knowing that only Jo Wall was the one reported by hearsay upon hearsay to have participated in an altercation that evening, the defendant, S. L. Inlow, nevertheless, withheld that name in reporting to the board (A. 51). The report of S. L. Inlow to the board was that the call was from a teacher reporting that one of the three girls under consideration had been involved in an altercation outside the gymnasium that evening. S. L. Inlow did not give the name of which girl it was, even though he had been told by Curtis Powell (A. 60).

Mrs. Curtis Powell, without asking which one of the girls was reported to have been involved, withdrew her recommendation as to all three girls, "washing her hands of the whole affair" (A. 52).

The defendant, Duddy Waller, without asking which one of the three girls was reported to have been involved, likewise withdrew his recommendation for leniency (A. 52).

The School Board, without asking which one of the three girls was reported to have been involved, voted to expel all three of the girls for the rest of the semester (A. 60, 61).

The defendant Inlow, knowing that only Jo Wall was reported by hearsay upon hearsay to have been involved in the altercation, sat there and witnessed the turnabout of the two teachers and the action of the board in expelling all three girls and never volunteered the name of the one girl involved in the hearsay report, or even that Mr. Curtis Powell had given him the name of which one.

In their STATEMENT the Petitioners described the girls' actions on page four as follows:

> The girls admitted that they had poured a quantity of alcoholic beverage into punch served at an extracurricular school function . . . .

This statement creates a picture of the girls emptying a large container of "alcoholic beverage" into a punch bowl. The picture is not true. What actually happened is accurately described in the opinion of the Court of Appeals as follows:

> The three girls obtained permission to leave the campus and travelled to a tavern in Oklahoma where Jo Wall purchased two 12-oz. bottles of a flavored malt beverage "Right Time." The three students purchased six 10 ounce containers of a soft drink and combined the total eighty-four ounces of liquid in a milk carton and returned with the mixture to school. To the liquid was then added enough water to total one and one-half gallons of punch, which was served at the gathering.

That statement of what transpired is fair to the girls. That contained in the Petitioners' brief is not.

ARGUMENT

Rule 19 of this Court provides, in pertinent part, as follows:

> "1. A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:
>
> (a) (Applicable to State Courts).
>
> (b) Where a Court of Appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> 2. (Not applicable)."

Under the subdivision of their Brief beginning on page 6 and headed REASONS FOR GRANTING THE WRIT, the Petitioners fail to set out any of the foregoing grounds. The closest they get is as follows:

> 1. (On page 7): The holding of the Court of Appeals in this case is a drastic departure from those settled principles and will vastly increase the frequency and extent of judicial interposition in public school matters.
>
> 2. (On page 12) (The) Court of Appeals also has increased the exposure of public school boards to liability for monetary damages in suits by students alleging deprivation of civil rights.

Petitioners never make any argument that any one of those propositions comes close to the circumstances set out in Rule 19. In effect, the Petitioners are merely arguing the merits of their appeal on the premise that the Court of Appeals has erred in its findings of fact and conclusions of law. It is not the function of a Petition for Writ of Certiorari to argue the merits of the appeal. Some basis must be demonstrated for this Court to exercise its discretion in granting a Petition for Writ of Certiorari and any argument on the merits would come only after this Court reached the decision that the particular case involved questions of the import suggested by Rule 19.

This is not such a case. If it were, Petitioners would be able to point to the reasons why it were.

On the issue of federal court jurisdiction in suits involving the constitutional rights of students of public schools, this Court has already treated that subject in several decisions, probably the most notable of which is *Brown* v. *Board of Education*, 349 U.S. 294, 99 L.Ed. 1083 (1954). This Court is more familiar with that line of cases than is the writer of this Brief.

As to the doctrine of Governmental Privilege or Immunity, Petitioners admit that this Court has likewise

treated that subject many times (their Brief page 12). They say, however, that it has not done so in the context of public school officials.

On their pages 12, 13, 14 and 15, the Petitioners discuss several cases which allegedly have disagreed on the application of an official privilege defense in school official cases to varying degrees, but from the discussion it appears that most of the disagreement was among the three judges in the first case discussed, *Smith* v. *Losee*, 485 F.2d 334 (10th Cir. 1973) and their disagreement was more over a factual interpretation in their particular case than a legal interpretation. That decision cited several decisions by the United States Supreme Court wherein the doctrine has already been fairly well spelled out. *Bradley* v. *Fisher*, 80 U.S. 335, 20 L.Ed. 646; *Tenney* v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019; *Barr* v. *Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434; *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492; *Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288; *Dombrowski* v. *Eastland*, 387 U.S. 82, 87 S.Ct. 1435, 18 L.Ed.2d 577; *Doe* v. *McMillan*, 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912.

There does not seem to be any substantial variation in the discussion of the degree of application of the doctrine; the difference comes merely in applying it to specific factual situations, and there is no way that the United States Supreme Court or any other court can eliminate that by any further repetition or rephrasing of the terminology of the doctrine. Therefore, there is nothing that compels any further review of the subject than has already been had by the United States Supreme Court.

All of the cases cited by the Petitioners have been read but a discussion of them would not be helpful. Suffice it to say that they are not applicable and not helpful

in this case. Many of them actually can be taken as examples of the federal courts making rulings entirely consistent with the decision of the Court of Appeals in this case. Respondents will touch on them briefly.

Shelton v. *Tucker*, 364 U.S. 479, 487 (1960), this was the decision overturning an Arkansas statute which required teachers to file, as a condition of employment, a detailed affidavit setting forth a considerable amount of personal data, much of which was unrelated to their qualifications for teaching.

Tinker v. *Des Moines Community School District*, 393 U.S. 503, 507 (1969). This is the case where some students and teachers wore black arm bands to protest the Vietnam War. Action of the school board in suspending them was held to be unconstitutional.

Epperson v. *Arkansas*, 393 U.S. 97 (1968). This is the case that held the Arkansas statute prohibiting the teaching of evolution as unconstitutional.

Pickering v. *Board of Education*, 391 U.S. 563 (1968). This case involved the teacher who wrote a letter to the newspaper criticizing the school board and school administration for their manner of handling a campaign to increase school taxes. She was discharged and brought suit and obtained reinstatement.

Freeman v. *Gould Special School District*, 405 F.2d 1153 (8th Cir. 1969). Suit by teachers to compel the school district to renew their teaching contracts, damages and attorney's fees. Circuit Court of Appeals, 8th Circuit, Judge Lay dissenting, held that since there was no discrimination and since Arkansas school boards had an absolute right not to rehire, same was an internal matter and presented no question of Federal due process.

Murray v. *West Baton Rouge Parish School Board,* 472 F.2d 438, 444 (5th Cir. 1973). This suit was purely an attack on the reasonableness of a state statute, high school regulations and a system of psychological testing used in the elementary schools. The Court held all three to be reasonable. There had been no denial of any hearings and no suspensions without hearings. The Court did say:

> Page 443: "It is clear that suspension for 40 days or more without provision for a prior hearing presents serious due process problems."

Shock v. *Tester,* 405 F.2d 852 (8th Cir. 1969). Plaintiff brought suit on ground of denial of equal protection of the laws, because as he claimed, the State police had filed a false and fraudulent police report exonerating a well known political figure from fault in a car accident. The Court of Appeals, 8th Circuit, held against him because he had not alleged that the action of the police was intentional or purposeful discrimination. The Court of Appeals indicated that had he so alleged he would have brought himself within *Snowden* v. *Hughes,* 321 U.S. at page 8, where such was held to state a cause of action.

McLaughlin v. *Tilendis,* 398 F.2d 287 (7th Cir. 1968). Suit by probationary teachers against superintendent and school board alleging that a non-tenured teacher was dismissed solely because of his membership in a union. The Court of Appeals held that this stated a claim upon which relief could be granted under the Civil Rights Act.

REPLY TO ARGUMENT OF PETITIONERS

The very first sentence under the portion of the petitioners' brief heading REASONS FOR GRANTING THE WRIT states:

> This case involves important issues as to the jurisdiction of federal courts to intervene in the day-to-day operations of the public school systems of this country.

Respondents disagree with that statement. The effort of the board is to play the matter down and treat it as though it were a routine, daily affair, inconsequential when viewed in the light of the operation of the school. This is unfair to the students. It reduces them virtually to nonentities. It is contrary to the realities of the situation. It is not a daily, routine matter in the public schools of Mena, Arkansas for three students to be penalized this severely. In fact. the superintendent could remember about only six prior expulsions during his tenure of more than seven years at the school.

What this case involves is the right of a school board to hold a secret meeting late at night without notice to either parents or children and destroy one full year of study by three students, blight them for life and make a permanent record against them, without calling any witness who knew anything at all except what three little scared fifteen year old girls had "confessed" in fright and while pleading for mercy. The only two witnesses that ever appeared before the board were not witnesses at all. They were teachers who apparently were somewhat afraid for their own jobs. Mrs. Curtis Powell, the Home-Ec teacher, after obtaining the first "confession" by promises that it would be held confidential and never reported any higher up in the school system, reneged on her promise,

giving to the girls as her reason that if information on the incident reached her superiors otherwise than through her that she would lose her job.

The second statement of the Petitioners under this section is:

> At issue is the extent to which a public school student has a federally protected right to challenge a school board decision to suspend him from school when the grounds for the suspension
>
> (1) do not involve deprivation of any specific constitutional right and
>
> (2) the challenge to the suspension rests merely on an alleged lack of substantial evidence supporting the decision.
>
> Respondents disagree with that statement.

Perhaps there is nothing in the federal constitution requiring states to maintain systems of free public education, but when a state elects so to do, then the decisions from the federal court are literally legion that the citizens of that state have a federally protected constitutional right to receive the benefits of that state provided education. In the case of *Ordway* v. *Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971), at page 1158, the court said:

> It would seem beyond argument that the right to receive a public school education is a basic personal right or liberty. Consequently, the burden of justifying any school rule or regulation limiting or terminating that right is on the school authorities. *Richards* v. *Thurston*, 424 F.2d 1281 (First Circuit 1970).

As to subparagraph (2) set out above, the word "substantial" has no place in the case at all. There not only

was not "substantial" evidence; there was *no evidence*. As stated by the Court of Appeals:

> No evidence was presented at either meeting to establish the alcoholic content of the liquid brought to the campus. Moreover, the board made no finding that the liquid was intoxicating.

Judge Mehaffy, in his dissent, repeatedly attempted to characterize this case as one in which the Circuit Court of Appeals was passing on the sufficiency of the evidence before the school board and requiring the United States District Court to do the same thing. That view is entirely incorrect and misconceives the whole problem.

The problem is that this school board eliminated one entire year of school work by these three students and saddled them with a permanent record and permanent stigma without any evidence at all; and we do mean that they did it without any evidence at all. It was not a question of sufficiency or insufficiency of evidence. It was a situation of a school board taking some severely drastic action without any evidence at all.

Judge Williams in his opinion (Petitioners' brief page A-20) stated:

> The Plaintiffs themselves concede that they violated the school policy, ...

Likewise, Judge Mehaffy, in his dissent, picked up this remark and stated (Petitioners' brief page A-12):

> the students by their own admission had violated the rule . . . .

This statement is not accurate. It is in direct conflict with the testimony. The students never at any time admitted that they had violated the rule. The students were

quite frank and honest in telling exactly what they did but they never did undertake to express any opinion whatever about whether they had violated the rule or not. On cross-examination, Dr. John Woods, president of the school board at the time the action was taken, admitted, after several repetitions of the question, that the students had not violated the rule and that they had been eliminated from school, destroying one year of school work when, in fact, they had not violated the school rule. This is in the testimony of Dr. John Woods. It is in the cross-examination. He admitted that the children had not violated the rule. The statement in the opinion of the District Judge and the statement in the opinion of Judge Mehaffy that the students admitted violating the rule is not correct. It does an injustice to these children in that it makes them appear as though they were confessing their guilt even under circumstances where no effort has ever been made by the board to prove them guilty and, as a matter of fact, the uncontroverted circumstances demonstrate conclusively that they did not violate the rule and were not guilty of violating the rule. Their little childish prank was not a violation of the rule which was invoked against them and under which they were severely punished. Therefore, there is no question of "lack of substantial evidence." There is no question of the Court of Appeals passing on the sufficiency of evidence before the school board. The question is whether or not the school board has a constitutional right to destroy one year of study and place a stigma upon a student without any proof whatever of any violation of any of its rules, whether valid or not.

Later, on page six, Petitioners state:

> Reasoning that no violation of the rule had thus been established, the Court of Appeals equated that with a violation of substantive due process and held the suspensions invalid.

The Petitioners considerably oversimplify the opinion, reasoning and rulings of the Court of Appeals. A fundamental proposition of the whole matter is noted by the Court of Appeals at opinion page six as follows:

> We hold that the suspensions for the balance of the semester imposed by the board were severe enough to require that due process be afforded the affected students. They resulted in the girls effectively losing nearly a full year's credits.

The Board in effect sentenced these three girls to the loss of a year, to the stigma of having been expelled and excluded from their class for nearly a full semester, and to the having of a permanent record of expulsion made against them as required by the rule, and which obviously would be furnished to any prospective employer or to any college who made inquiry for a transcript of the students' school records. The Court of Appeals certainly was on firm ground in holding that a penalty of this magnitude could not be assessed without affording these children due process of law.

On page seven of their petition and brief the Petitioners quote Judge Mehaffy as stating:

> Nor is this case where the procedure accorded the students was inadequate, unreasonable, or unfair.

We beg to take emphatic issue with the Petitioners and with the learned Judge. This is indeed a case where the procedure accorded the students was grossly inadequate, extremely unreasonable and extremely unfair.

On their page eight, the Petitioners quote Judge Mehaffy as saying:

. . . after full procedural protection was afforded, the rule was enforced.

Again, we wish to take emphatic issue with the Petitioners and the learned Judge. No procedural protection whatever was afforded, much less full procedural protection.

The opinion of the Circuit Court of Appeals, page six, states:

> We think it clear that the students were denied procedural due process at the February 18 meeting of the board.

Certainly it is clear. This was a secret meeting, held at night, after 9:00 P.M. when most meetings of this nature either have adjourned or are adjourning, without any notice whatsoever to the children or their parents and without any witnesses of any kind present and with no inquiry whatever into the fundamental issues of a violation of the rule, the board arbitrarily with no proof and no investigation, sentenced these three children to a very severe penalty. There was no procedural protection and no substantive protection.

On their opinion page 6 the Court of Appeals stated:

> "We recognize that the March 2 meeting may have cured the procedural defects because it was held promptly after the suspension, and because the students and their parents were given notice of the time and place of the meeting and were given an opportunity to present evidence. But we need not decide whether, in fact, the meeting did so because the students were denied substantive due process at both meetings."

No doubt it is from this second meeting that Judge Mehaffy is drawing his conclusion that procedural due process was afforded and that all prior wrongs were thus righted.

As a matter of fact, the truth established by the proof is that the meeting was granted only after it had been repeatedly refused by both the superintendent Inlow and by the president of the Board Stevenson and by some members of the Board, and it was finally and grudgingly granted only after the students and their parents hired an attorney. The meeting was just as grudgingly conducted as it was granted. The Board members assembled and sat in stony silence while the children apologized and begged to be reinstated. Again, no proof whatever was presented by the Board and no investigation whatever was made by the Board to determine if indeed the children had violated the rule. Further, the two teachers who had been at the earlier meeting, the one at which the children were expelled, were both in the building, unknown to the children, their parents or attorney, and neither was called into the room by the Board nor presented before the children and their parents and attorney. Further, the attorney had attempted to obtain the presence of the children's home room teacher and that likewise was frustrated by the superintendent, Inlow. The following is from the record:

> At appendix page 53, Mr. Inlow was asked by plaintiffs' attorney referring to the meeting of March 2:
>
> "Q. Did you know that I had called Peggy's homeroom teacher, Mrs. Gazell, and asked her to be present, be there?
>
> A. Yes, sir.
>
> Q. Did you talk to her about that?

A. I talked with her later that day; she came to me, I did not send for her, she came to me.

Q. What did you tell her about attending any meeting that night?

A. I told her she did not have to attend; if she cared to, certainly she would be welcome to attend."

Here we have an example of the attorney for the plaintiffs making arrangements for the homeroom teacher to attend the meeting. Such teacher being naturally concerned about her relationship with her supervisors, reports the request to Mr. Inlow and he tells her that she does not have to attend. What would any teacher do? Naturally, she got the message that it would be better for her if she did not attend.

The only two "witnessess" at the February 18 hearing were Mr. P. T. Waller and Mrs. Curtis Powell. Let us again look at the appendix, page 45, where we find these statements by Mr. P. T. Waller:

"Q. Now, then, I want to ask you about a meeting of the School Board on March 2nd, Thursday night of last week; where were you Thursday night of last week?

A. I was in the building.

Q. Why didn't you come to the meeting?

A. Because I was right in my office there, if they needed me—I told them that if they needed me, I asked Mr. Enlow if I should go and the attorney asked him if I should go and they said 'if we need you we will call you', so I worked in my office about ten yards from where the meeting was being held. They could have got me at any time."

Page 46:

"Q. But you never did come in the meeting?

A. No, sir.

Q. And the reason of course was you was not asked to come in?

A. No, sir, I was not asked.

Q. Well—

A. But I was available.

Q. Did you see me while I was there?

A. No, sir.

Q. For the record I did not see him, Your Honor, and did not know he was in the building. Now, of course, not (24) attending the meeting you do not know whether Mrs. Powell was there or not?

A. Yes, Mrs. Powell was definitely there.

Q. She was there? How do you know that?

A. She was working in her room.

Q. She was in the building too?

A. Yes and was available.

Q. Do you know why she did not come to the meeting?

A. No, sir."

At appendix page 53, again in Mr. Inlow's testimony immediately following that previously referred to and still referring to the meeting of March 2, we find:

"Q. Now, on the occasion of the meeting of course you did attend, didn't you?

A. Yes, sir.

Q. You took the minutes of the meeting?

A. Yes, sir.

Q. Did you know that Mr. Waller was there in the building?

A. I did.

Q. Did the Board know that?

A. Yes, sir.

Q. Did you know that Mrs. Powell was there in the building?

A. Yes, sir.

Q. Did the Board know that?

A. I think so. Some of them at least."

Neither meeting furnished either procedural due process or substantive due process. A second meeting had likewise been held by the Board in the case of *Vought* v. *Van Buren Public Schools*, 306 F. Supp. 1388 (A. D. Mich. S. D. 1969) where the Court said at page 1393:

> "Plaintiff claims he was entitled to a hearing. Defendants say he got one. Defendants refer to the Board meeting when Plaintiff appeared with his parents and his attorney. This was subsequent to the expulsion. Plaintiff had been presented with a *fait accompli* at this point."

The decision cited on page 7 of their Brief by the Petitioners assumes that the penalty assessed upon these children was an inconsequential and routine matter in the "daily operation" of the Mena School system. This is in direct conflict with the facts.

On page 8 of their Brief the Defendants admit that Federal Courts have jurisdiction to protect students whose rights of speech, association, religion or equality of race or sex have been infringed by school administrators

or Board members. The Petitioners imply, however, that these are the only rights of students which Federal Courts have jurisdiction to protect. A legion of cases from the Federal Courts establish otherwise.

Petitioners follow this with a statement: "And it is equally clear that education itself is not a federally protected right" and cite a case dealing with the financing of school systems and in which the Plaintiffs were attempting to force a state to establish and finance a particular type of educational system. Cases dealing with the constitutionality of state laws regulating nudism would have about as much relevance here as that type of case; however, a recent decision by this Court demonstrates that federal courts do have jurisdiction in cases involving the type of education a State is going to furnish, even though doing so may involve problems of coming up with more money. See *Lau* v. *Nichols*, ... U.S. ....., 39 L.Ed.2d 1 (2-18-74).

On page 9 the Petitioners follow a discussion of that irrelevant case, *San Antonio School District* v. *Rodriquez*, ... U.S. ....., 36 L.Ed.2d 16 at pages 44-46, with this statement:

> "Thus the finding herein of a violation of a federal 'substantive due process' rests on nothing more than the Court of Appeals' conclusion that the suspension decision was 'wrong,' or unsupported by substantial evidence."

Respondents disagree with that statement. It oversimplifies the approach, reasoning, conclusions and ruling of the Court of Appeals. That finding by the Court of Appeals rests upon a record showing that there was no proof whatever, not just insubstantial proof, but no proof whatever; zero proof; of any violation of the school rule. There is indeed a difference in connotation between the

terms "substantial evidence" and "no evidence". The finding by the Court of Appeals that there was a violation of federal substantive due process is based upon a record in which there is no evidence whatever of any violation and yet an arbitrary, groundless, unexplained ruling by the Board that this severe penalty must be suffered by these children.

In its next paragraph on page 9 the Petitioners assume that no constitutional right is involved and thus by so doing distinguish all of those authorities which they cite. By also saying that "grievances arising out of merely erroneous decisions by state and local officials do not rise to constitutional proportions" Petitioners likewise distinguish their discussion from this case. This is not a situation of a "merely erroneous decision by local officials". This is a case where the decision made by the Board was made without proof, without evidence, without the presence of the persons punished, without notice to them, without any protection at all, either procedural or substantive and which resulted in the imposition of a penalty which was severe in the extreme. It was arbitrary, unreasonable, unfair, highhanded, officially adjudged punishment of the worst sort.

At the bottom of page 11 the Petitioners refer to a virtual explosion of litigation initiated by disgruntled, non-tenured school teachers concerning non-renewal of their teaching contracts. There is litigation explosion in several other areas also, products liability, other areas of law relating to consumers, ecology, etc., etc. What that has to do with this case, or why these children should be sentenced to this punishment, and such sentence permitted to stand, admittedly escapes us. How the fact of litigation explosion in particular areas can be argued as a ground for denying constitutional protection to those entitled to it is indeed a novel argument.

CONCLUSION

The Petitioners have failed to establish any basis for the exercise by the Court of its discretion to grant a Petition for Writ of Certiorari in this case and, accordingly, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX I

Response to Application for Extension of Time in Which to File Petition for Writ of Certiorari

To the Honorable Harry A. Blackmun, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eighth Circuit:

1. Respondents deny that there is any basis for granting an extension of time to the Petitioners for the filing of a Petition for a Writ of Certiorari in this case. The only reason stated in the Petition is not sufficient.

2. Respondents deny that the nature of the case is fully and accurately stated in the Petition.

3. Respondents deny the allegation that no prejudice will result to them from the requested extension.

4. Respondents state that ninety days is more than sufficient time for the Petitioners to have decided whether or not to seek a review of the decision of the Court of Appeals and to prepare and file a Petition for Writ of Certiorari. Petitioners are not entitled to an extension of time and have failed to show themselves entitled to such extension of time.

WHEREFORE, Respondents respectfully request that the application for extension of time be denied.

APPENDIX II

Brief Separate Statement in Support of Response

Section 2101 (c) of Title 28, United States Code, provides as follows:

> Any other Appeal or any Writ of Certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A Justice of the Supreme Court, *for good cause shown* may extend the time for applying for a Writ of Certiorari for a period not exceeding sixty days (emphasis added).

Rule 22, Supreme Court Rules, subparagraph no. 4, provides in pertinent part that an application for extension of time "must set forth with specificity the reasons why the granting of an extension of time is deemed justified." The subparagraph ends with these words:

"Such applications are not favored."

Justice Jackson commented upon this language in his decision in *Knickerbocker Printing Corporation* v. *United States of America*, 99 L. Ed. 1292 (b September 3, 1954). In that case the reason given for the requested extension of time was that the applicant's attorneys had been actively engaged in the preparation of matters previously scheduled for trial in other courts. Justice Jackson found that reason to be insufficient.

Here the only reason given is that "the undersigned Counsel have just been retained on this date to represent the Petitioners before this Court".

No reason is given as to why the Petitioners thought it necessary to change lawyers between the Court of Appeals and the U. S. Supreme Court. It could hardly have been lack of competency on the part of the lawyers who have been dropped.

The Petitioners S. L. Inlow and Duddy Waller were represented in the trial court and in the Court of Appeals by the law firm of Warren and Bullion, a long established law firm in the City of Little Rock, Arkansas. Although unknown to us we are as confident of it as if we knew it that both Mr. Warren and Mr. Bullion have been admitted to practice before this Court for many years and probably several years before either Mr. Friday or Mr. Smith. Both Mr. Warren and Mr. Bullion are prominent, able and competent attorneys. Mr. Bullion is a former President of the Arkansas Bar Association. Trial of this case was had in the United States District Court for the Western District of Arkansas on August 17, 1972, and Mr. Eugene Warren actively participated in that trial representing Mr. Inlow and Mr. Waller. As noted, he likewise continued representing them on through the Court of Appeals.

The remaining Petitioners have been represented, since prior to the filing of this lawsuit, by Honorable Joe H. Hardegree, a practicing attorney at Mena, Arkansas since about 1960. Mr. Hardegree served three terms as Prosecuting Attorney for the District in which he is located. It is unknown to the writer of this Brief whether Mr. Hardegree is admitted to practice in the United States Supreme Court but we would be very surprised if he is not. He represented the Petitioners other than Inlow and Waller in the trial of the case in the United States District Court in Fort Smith and represented them on the appeal in the Court of Appeals.

If it was necessary for the Petitioners to change Counsel following the denial of the Petition for rehearing in this case, that could have been done much sooner than December 13, 1973, only thirteen days prior to the end of the ninety-day period allowed for filing a Petition for Writ of Certiorari. There is no intention here to criticize any of the lawyers, either those formerly representing the Petitioners nor those now doing so. The case does not belong to the lawyers. It belongs to the Petitioners and it is their responsibility to move the case on schedule and to make their decisions about which lawyers they will employ in time for those lawyers to perform the duties for which they are employed. The Petitioners have procrastinated from September 27 until December 13 before hiring new lawyers; thus the risk that the new lawyers cannot perform in time belongs to those who procrastinated, and not to the Respondents. Actually, ninety days is more time than is needed for the filing of a Petition for Writ of Certiorari. Appeal time to the Court of Appeals and appeal time to the Supreme Court of the State of Arkansas from an Arkansas Trial Court is only thirty days. These attorneys are accustomed to that thirty-day limitation. If it was going to be necessary to change attorneys between the Court of Appeals and the United States Supreme Court this certainly could have been determined and effected shortly after September 27 if Petitioners had shown any reasonable diligence.

Respondents submit that the reason for the requested delay is insufficient and that extension of time should be denied.

APPENDIX III

Motion to Revoke Order Extending Time

Comes Respondents herein and for their Motion to revoke an Order extending the time of the Petitioners to file a Petition for a Writ of Certiorari in this case respectfully state:

1. The letter of transmittal by Mr. G. Ross Smith to the Clerk of this Court, and the Certificate of Service on the pleading styled APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI, demonstrate that the application was prepared and mailed on December 13, 1973. The copy thereof supplied to Counsel for the Respondents arrived in his office on December 14, 1973, a Friday. It arrived too late for attention on that date and on the following Monday, December 17, 1973, Counsel for Respondents did the necessary legal research and dictated the necessary pleadings in response to the said application. This dictation was typed and mailed on Tuesday, December 18, 1973, the second business day after the copy of the application was received.

2. The Response and Brief Separate Statement in Support thereof demonstrate that there is a failure to show "good cause" for such extension as is required by Section 2101(c) of Title 28, United States Code, as a basis for extending the time for applying for a Writ of Certiorari, and further demonstrate that such "good cause" does not exist in this case.

3. The pleading entitled RESPONSE TO APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI and the BRIEF

SEPARATE STATEMENT IN SUPPORT OF RESPONSE TO APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI, both of which were forwarded for filing in this case by Respondents on December 18, 1973, are hereby incorporated in this Motion by reference as fully as if set out herein word for word and line for line.

.4 Rule 22 of this Court, subparagraph number 4, provides that applications of this nature are not favored.

5. The circumstances of this case, where the applicants have failed to show any good cause for an extension of time as required by statute, and where no good cause exists, and where such applications are not favored, demonstrate unequivocally that the present application for extension of time should not be granted.

WHEREFORE, Respondents respectfully move that the Order of December 17, 1973 be withdrawn and that the extension of time be cancelled and the December 26, 1973 deadline be re-imposed, respected and enforced.

Supreme Court, U. S.
FILED
JUN 28 1974
MICHAEL RODAK, JR., CLERK

Signed Copy

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1285

JOHN P. WOOD, et al.,
Petitioners,

vs.

PEGGY STRICKLAND, a Minor, by Mr. and Mrs. Virgil Justice, Her Parents and Next Friends; VIRGINIA CRAIN, a Minor, by Doris Crain, Her Mother and Next Friend,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONERS

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IN THE

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONERS

CITATIONS TO OPINIONS BELOW

The September 29, 1972 decision of the United States District Court for the Western District of Arkansas, Fort Smith Division, is reported at 348 F.Supp. 244 (W.D. Ark. 1972) and is set forth as Appendix V in the Petition for a Writ of Cer-

tiorari, page A-15. The August 29, 1973 opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Strickland v. Inlow*, 485 F.2d 186 (8th Cir. 1973) and is set forth as Appendix I to the Petition for a Writ of Certiorari, page A-1. The opinion of three Judges of the Court of Appeals dissenting from the denial of the Petition for Rehearing En Banc is reported at 485 F.2d 191 and is set forth as Appendix III to the Petition for a Writ of Certiorari, page A-11.

JURISDICTION

The judgment of the Court of Appeals was entered on August 29, 1973. (A. 135-36). On September 27, 1973, the Court of Appeals denied a timely filed petition for rehearing, Appendix II to the Petition for Certiorari, p. A-10. On December 13, 1973, petitioners timely applied to Mr. Justice Blackmun for an extension of time for filing the petition and an order was entered by Mr. Justice Blackmun on December 17, 1973 extending the time for filing of the petition to February 22, 1974. Appendix IV, *Ibid* p. A-14. The Petition for a Writ of Certiorari was filed February 21, 1974 and Certiorari granted on April 15, 1974. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

QUESTIONS PRESENTED

1. Whether federal courts have jurisdiction to invalidate, on grounds of insufficiency of evidence, a public school board's decision to suspend a tenth grade student for possession and use of intoxicating beverages at a school function on school premises, where the student presents no claim of deprivation of fundamental constitutional rights of speech, association, religion or equality of race or sex, and where the procedures utilized in effecting the suspension have not been held unlawful?

2. Whether a public school board member is entitled to invoke the doctrine of official or sovereign immunity in a student's civil rights suit under 42 U.S.C. § 1983 so as to avoid individual and personal financial liability except where the acts complained of were done with malice?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

and 42 U.S.C. § 1983

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT

The Complaint herein was filed by two tenth grade students (and their parents) of the Mena Special School District of Polk County, Arkansas against certain administrators of the district, the school district itself and all members of the Board of Education in their individual and representative capacities, alleging jurisdiction under 28 U.S.C. §§ 1343(3) and (4), 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. §§ 1981 and 1983 and deprivation of rights under the Fifth, Fourteenth and Ninth Amendments to the United States Constitution. The original Complaint sought injunctive and declaratory relief. (A. 6-12) By amendment (A. 91-92), the plaintiffs claimed monetary damages, both compensatory and punitive. The action complained of was the suspension of the girls for the balance of the school semester because of a school board finding that the students had violated a rule prohibiting possession or use of intoxicating beverages at school or at a school sponsored activity.[1] The rule had been adopted January 10, 1967 after Board consideration of an incident (unrelated to this suit) involving students' consumption of beer at a school function and a Board finding that "drinking intoxicating beverage at school or at a school-sponsored activity is a most serious offense and if tolerated, would impair the discipline of the entire school." (A. 103—Exhibit B to Answers to Interrogatories, No. 10). The three girls[2] had admitted, first to Mrs. Powell, their teacher, and then to Mr. P. T. "Duddy" Waller, their principal, that on the day scheduled for an extracurricular school function to be conducted on school premises by the home economics department for parents and students (A. 16), they left the school grounds, traveled into the State of Oklahoma[3] and there purchased at a tavern several bottles of a malt liquor beverage (A. 48) with which they intended to "spike" the punch to be served at the function. (A. 17-19, 30-31, 41, 43). They then mixed the malt liquor with several bottles of soft drink, brought it to the school and then added water to the mixture which was ultimately served at the meeting of parents and students just after cessation of classes on that day. (A. 19, 22) Several days after the event, Mrs. Powell learned of the girls' action and upon confronting them with her information, the girls confessed their involvement (A. 23, 43). Mrs. Powell, after first indicating to the girls that she would attempt to handle the discipline herself (A. 23, 43), later decided that the matter should be brought to the attention of Mr. Waller, the principal (A. 24, 44). After the girls had reiterated their confession to him on February 18, 1972, Mr. Waller advised the girls that the Board of Education would have the ultimate responsibility for discipline, but that he was going to suspend them from class and extracurricula activity for one week until such time as the Board could consider the matter, and that he would ask the Board to be lenient (A. 24-26, 45, 51, 56). As it turned out, the Board met in special session that evening to consider the matter (A. 54, 62). Mrs. Powell and Mr. Waller relayed to the Board the statements made by the

---

[1] The rule is as follows:

"3. Suspension

* * * * * * * *

b. Valid causes for suspension from school on first offense: Pupils found to be guilty of any of the following shall be suspended from school on the first offense for the balance of the semester and such suspension will be noted on the permanent record of the student along with reason for suspension.

(1) Immoral conduct

(2) Insubordination

(3) Conduct that would tend to impair the discipline of the school

(4) The use of intoxicating beverages or possession of same at school or at a school sponsored activity

(5) Conduct that would tend to harm other pupils."

(A. 100, 102—Exhibit A to Answer to Interrogatories, No. 7).

[2] One of the girls, Jo Wall, has not participated in this litigation.

[3] The sale of alcoholic beverages is unlawful in Polk County, Arkansas. (A.33).

girls as to the purchase and use of malt liquor (A. 73) and recommended that the Board be lenient if it felt such an approach warranted (A. 51, 54, 63-64, 70). Before the Board acted on the matter, Mr. Inlow, the Superintendent of Schools who was also at the meeting, received a telephone call from a teacher and was advised that Jo Wall, one of the girls in the incident under consideration by the Board, had been involved in an altercation at a basketball game earlier that evening (A. 51, 64, 73-74). Mr. Inlow announced the substance of the telephone call,[4] (without identifying the name of the girl involved in the altercation) and at that point, Mr. Waller and Mrs. Powell withdrew their recommendation of leniency (A. 51, 70). After discussion, the action decided upon by the Board was to suspend the girls for the balance of the semester (A. 65, 71; see generally Ex C-1, Answers to Interrogatories, Minutes of February 18, 1972 Meeting, A. 105-06).

The next day, February 19, 1972, the school administrators met with the students and their parents to advise them of the action taken. (A. 27-28, 46). Also, on February 24, 1974, the Superintendent wrote to the parents advising of their right to petition the Board for reinstatement (A. 137-38, received in evidence at trial as Defendant Inlow's Exhibit 8). A special meeting of the Board was thereafter held on March 2, 1974 in connection with the request of the students, their parents and attorney (A. 35; see A. 138, received in evidence at trial as Defendant Inlow's Exhibit 9). The Board presented a statement containing its findings[5] supporting the decision (A. 35).

---

[4] An alleged threat by Jo Wall to "get even" with someone the former believed to have reported the girls' involvement to Mrs. Powell (A.114).

[5] "FACTS FOUND BY SCHOOL BOARD

1. That Virginia Crain, Peggy Strickland and Jo Wall are students of Mena High School and subject to the governing rules and policies of Mena High School.

2. That on or about February 7, 1972 these three girls were charged with the responsibility of providing refreshments for a school function, being a gathering of students of the Home Economics class and some of their parents, on school premises, being the auditorium building of Mena High School, and being under the direction of Mrs. Curtis Powell.

3. That the three girls in question traveled to Oklahoma, purchased a number of bottles of malt liquor, a beer type beverage, and later went onto school premises with the alcoholic beverage and put two or more of the bottles of the drink into the punch or liquid refreshment which was to be served to members of the class and parents."

(Reproduced at A.137 and received in evidence as Defendants' Exhibit 1 at March 7, 1972 hearing, A.39. The document was Plaintiffs' Exhibit 14 at trial.)

After the students and their attorney had been heard (A. 35, 46), the Board again voted on the matter and upheld the suspension. (A. 9; see generally Ex. C-2, Answer to Interrogatories, Minutes of March 2, 1972 meeting, A. 106-07). The Board did make provisions so that, by a special course of instruction consisting of correspondence courses and increased course loads, the girls could graduate with their class (A. 36, 47; see 348 F. Supp. at 246).

The Complaint was filed on March 6, 1972 (A. 6) and, on March 7, 1972, the District Court held an evidentiary hearing on the request for a preliminary injunction, made findings of fact and conclusions of law and denied relief (A. 78-84). On March 14, 1972, the Board issued a statement setting forth its view of the situation (A. 139, received in evidence at trial as Plaintiffs' Exhibit 19).

On April 7, 1972, a hearing was held on the plaintiffs' motion to amend their Complaint to seek from the district and from the defendants individually, $50,000 compensatory damages and $5,000 punitive damages from each defendant (A. 86, 91-92). At the hearing, the District Judge suggested that the Board reconsider its action and asked for a report advising of the results of such reconsideration (A. 86-89). The Board did reconsider the action at a regular meeting on April 11, 1972,

attended by the plaintiffs, and a motion was made to reinstate the children in school but failed to carry (A. 90-91; see generally Exhibit C-4, Answers to Interrogatories, Minutes of April 11, 1972 meeting, A. 108). The jury which heard the case on August 17-19 failed to reach a verdict and a mistrial was declared (A. 122).[6] Thereafter, the District Court granted motions[7] of all defendants for judgment in accordance with their previous motions during trial for directed verdicts. *Strickland v. Inlow*, 348 F. Supp. 244 (W.D. Ark. 1972). The Court held that the Board's rule was reasonable, and had not been unconstitutionally applied, that Arkansas law permitted suspension for any conduct tending to impair discipline and that, in any event, the defendants were immune from liability for damages unless they acted with malice, and the latter had not been shown.

On Appeal to the Court of Appeals for the Eighth Circuit, the judgment was reversed and remanded for a new trial on the issue of damages against the individual school board members.[8] The Court of Appeals held that, in its view, there was no evidence before the school board that the beverage used was "intoxicating"[9] within the terms of the rule and that the

[6] On appeal to the Court of Appeals, the students included in their Appendix to that Court a very limited portion of the testimony of witnesses at the various hearings and none of the testimony presented during the trial to the jury. The latter testimony has subsequently been transcribed and on June 13, 1974 filed of record with the Clerk of the District Court who at that time had possession of the record in the case. See List of Relevant Docket Entries, A.5.

[7] See Fed. R. Civ. P. 50 (6).

[8] The directed verdict for the school district was affirmed on the authority of *Monroe v. Pape*, 365 U.S. 167 (1961) and for Superintendent Inlow and Principal Waller because they had not voted for or recommended suspension.

[9] The girls have consistently conceded that the beverage purchased was "malt liquor" and "alcoholic." (See e.g. 30-32, 52, 59; *Strickland v. Inlow*, 348 F. Supp. 244, 246). In fact, one of the girls first advised Mr. Waller that the liquid purchased was twenty

students had therefore been deprived of substantive due process. The Court also held that the students were entitled to recover damages from school board members in their individual capacities without a showing of malice and upon a showing that the petitioners did not, in light of all the circumstances, act in good faith, objectively determined. The case was remanded for a trial on the issue of damages. *Strickland v. Inlow*, 485 F.2d 186 (8th Cir. 1973).

Rehearing was denied, with three judges of the Court of Appeals dissenting in an opinion which contended that the respondents had failed to show deprivation of a federally protected right and that ". . . the substantive reach of the due process clause on the public school campus is limited to the protection of specifically identifiable federal constitutional rights." *Ibid.* at 191.

SUMMARY OF ARGUMENT

It is the contention of the petitioners herein that the decision of the United States Court of Appeals for the Eighth Circuit in this case is erroneous in three respects:

(1) That decision totally ignores the issue whether these students have established one of the essential elements of a cause of action under 42 U.S.C. § 1983, i.e. the deprivation of a federally protected right;

(2) It erroneously invokes the discredited doctrine of substantive due process to invalidate a school board's decision to

percent alcohol (A.52). The District Court characterized the alcoholic—intoxicating beverage distinction as an argument from plaintiffs' counsel, not them or their parents. 348 F. Supp. at 247 and 250. The argument made by the plaintiffs themselves was that the punishment was too severe. *Ibid.* at 250. Other testimony, presumably knowledgeable, was that the alcoholic content of the beverage purchased was "not to exceed 3.2 alcohol by weight." Spahl Deposition, A.93-94.

suspend a student for the balance of a school semester with the sole basis of its holding being a deficiency of evidence to support the decision; and

(3) It renders members of the boards of education of public school districts individually and personally liable for financial damages to a student whom they suspended, even though they acted without malice.

Although many ambiguities surround the proper interpretation of 42 U.S.C. § 1983, it is quite clear that, in order to sustain a cause of action thereunder, the plaintiff must establish the deprivation of a right secured by the Constitution or laws of the United States and that the deprivation was effected under color of state law. *Adickes v. Kress & Co.*, 398 U.S. 144, 150 (1970). This case involves no showing of a deprivation of any specifically identifiable and fundamental right protected by the Due Process Clause of the Fourteenth Amendment or any other provision of the Federal Constitution. This suit is thus unlike *Healy v. James*, 408 U.S. 169 (1972); *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969); *Pickering v. Board of Education*, 391 U.S. 563 (1968) and other cases in which this Court has acted to protect against the action of public school officials whose conduct encroached upon fundamental rights such as freedom of speech, association and racial equality. The claims of these students must of necessity rest on a contention that the federally protected fundamental right deprived them by these school authorities was the "right . . . to receive an education in the public schools provided by the State." (Complaint, Paragraph 13, A. 10).

However, this Court has held that, notwithstanding its undisputed importance, the right to an education is neither explicitly or implicitly protected by the Federal Constitution. *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973). Although *Rodriguez* occurred in the context of this Court's inquiry into

the proper standard by which to judge the constitutionality of state legislation alleged to violate the Equal Protection Clause of the Constitution, its language and reasoning conclusively demonstrates that neither is the right to education federally protected as a "liberty" or "property" interest within the language of the Due Process Clause of the Constitution. Inquiry concerning the coverage of an interest by the Equal Protection Clause is interrelated with, and relevant to, inquiry into the same interest's coverage under the Due Process Clause. See *Bolling v. Sharpe*, 347 U.S. 497 (1954). In both instances the pertinent inquiry is into the *nature*, not the importance, of the interest. Compare *Rodriguez supra* (equal protection) with *Morrisey v. Brewer*, 408 U.S. 471 (1972) (due process).

Notwithstanding the absence in this case of any interest protected within the liberty or property language of the Due Process Clause of Fourteenth Amendment, the Court of Appeals invoked the much-discredited concept of substantive due process to invalidate the school board's suspension decision. The Court's substantive due process holding rests on its conclusion that the school board's finding of a violation of its rule prohibiting the possession or use of intoxicating beverages at school or at a school sponsored function was erroneous. The Court reasoned that since the beverage involved had not been proven to be "intoxicating" within the terms of the rule, even though the girls have repeatedly admitted that it was in fact "alcoholic" in content, that no violation of the rule had been shown. 495 F.2d at 190. Petitioners contend, as did three Judges of the Court of Appeals who voted to grant the petition for rehearing en banc, that federal courts are without jurisdiction to entertain challenges to the sufficiency of evidence on which their suspension decisions rest, unless of course the decision to suspend involves rights such as were asserted in *Healy, supra*; *Tinker, supra*; and *Pickering, supra*. No federally protected interest is involved, *Rodriguez, supra*, and a student does not assert a proper cause of action under § 1983 merely

by contending that school authorities have acted against him in an arbitrary or unfair manner. *Murray v. West Baton Rouge Parish School Board*, 472 F.2d 438, 444 (5th Cir. 1973). A Complaint alleging arbitrary, capricious and unreasonable action by school authorities does not, without proof that the action affected a federally protected interest, establish a cause of action under § 1983. *Jeffries v. Turkey Run Consolidated School District*, 492 F.2d 1 (7th Cir. 1974); *Scheelhaase v. Woodbury Central Community School District*, 488 F.2d 237 (8th Cir. 1973); *Freeman v. Gould Special School District*, 405 F.2d 1153 (8th Cir. 1969). Cf. *Board of Regents v. Roth*, 408 U.S. 564 (1972). The opinion of the Court of Appeals below is an unwarranted and unwise encroachment on the functioning of public school districts and the federal judiciary itself.

Petitioners contend that a public school board member, acting as such in discretionary functions assigned him by state law, is immune from liability for money damages to a student who alleges a proper claim under 42 U.S.C. § 1983. Where such awards are rendered against officials under circumstances such as those involved in the public school context and where it is in reality a charge against the funds of the State, the Eleventh Amendment constitutes an absolute bar. *Edelman v. Jordan*, — U.S. —, 39 L.Ed.2d 662 (1974). Also, the common law "executive" or "official" immunity defense should, because of the peculiar considerations present in the context of suits against public school board members, constitute an absolute bar to an award of financial damages where the school board members act only as a board performing discretionary duties. *Smith v. Losee*, 485 F.2d 334, 346 (10th Cir. 1973) (opinion of Judge Barrett, partially concurring and partially dissenting); *Abel v. Gousha*, 313 F. Supp. 1030 (E.D. Wis. 1970). In determining the scope of the immunity afforded by the defense, consideration must be given to the nature of the official's duties and responsibility and the considerations which have traditionally justified the immunity doctrine. *Scheuer v. Rhodes*, — U.S. —, 40 L.Ed.2d 90 (1974). One of the most significant considerations warranting immunity involves the desire to avoid the constant subjection of officials to the burdens of trials in which they are required to defend actions taken by them in the discharge of their duties. *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949).

Even if this Court should conclude that public school board members are not entitled to absolute immunity from liability for discretionary acts within the scope of their duty and authority, plaintiffs in § 1983 actions should be required to establish that the defendant school authorities acted with malice before they are subject to an award of financial damages. The District Court so held. *Strickland v. Inlow*, 348 F. Supp. 244, 250 (W.D. Ark. 1972). See *Smith v. Losee*, *supra* (opinion of Judge Barrett); *Holiman v. Martin*, 330 F. Supp. 1 (W.D. Va. 1971). See also *Gaffney v. Silk*, 488 F.2d 1248 (1st Cir. 1973), and *John v. Hurt*, 489 F.2d 786 (7th Cir. 1973). The conditioning of the immunity defense upon "good faith" action, whether the test of good faith be subjective (*Gaffney v. Silk*, *supra*) or objective as held by the Court of Appeals in this case (see also *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968)), affords inadequate protection to dedicated citizens who spend their time and energies, without financial remuneration, in such positions of responsibility.

ARGUMENT

I. Absent Claims of Deprivation of Fundamental Constitutional Rights of Speech, Association, Religion or Equality of Race or Sex, a Public School Student's Challenge to a School Board's Decision to Suspend Him From School Does Not Present a Federally Cognizable Claim Under 42 U.S.C. § 1983.

A. A Federal Court is without jurisdiction of a student's suit under 42 U.S.C. § 1983, challenging a public school board's suspension decision, unless the student establishes that the decision deprives him of an interest secured by the constitution or laws of the United States.

The students in this case challenge the action of the Board of Education of the Mena Special School District of Polk County, Arkansas, in suspending them from school for the balance of the semester because of a school board finding (A. 137) that the students had violated a rule (A. 102) prohibiting possession or use of intoxicating beverages at school or at a school sponsored activity. The two girls admitted to school officials that they had poured a quantity of alcoholic beverage into punch served at an extra curricular school function conducted on school premises by the home economics department for parents and students (E.g., A. 17-19). Their challenge to the Board's action, presented in a suit filed under 42 U.S.C. § 1983 in the United States District Court for the Western District of Arkansas, was denied in the District Court, *Strickland v. Inlow*, 348 F. Supp. 244 (W.D. Ark. 1972), but sustained in the United States Court of Appeals for the Eighth Circuit. *Strickland v. Inlow*, 485 F.2d 186 (8th Cir. 1973). The Court of Appeals held that the evidence relied on by the Board did not establish a violation of the rule since the alcoholic beverage used had not, in the Court's view, been established to have been an "intoxicating" beverage within the terms of the rule. 485 F.2d at 190.

Although the Court of Appeals did not expressly consider the requisite elements of the students' claims under § 1983, those requirements are clear. The plaintiff in such a suit must prove that (1) the defendants have deprived him of a right secured by the Constitution or laws of the United States and (2) that the deprivation was effected under color of state law. *Adickes v. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Monroe v. Pape*, 365 U.S. 167, 184, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). The terms of § 1983 protect only rights, privileges and immunities secured by federal law. Rights, privileges and immunities not derived from the federal Constitution or secured thereby are left exclusively to the protection of the states. Federal courts are without jurisdiction in such instances. 1 *Barron & Holtzoff, Federal Practice and Procedure* § 37. The petitioners here contend that these students have failed to establish the deprivation of a federal right and that the federal courts are without jurisdiction of their claims.

1. A student's interest in continued participation in the educational program conducted by a public school district is not an interest protected by the Constitution of the United States.

The inquiry as to whether a particular interest is embraced within and protected by the Due Process Clause of the Fourteenth Amendment must begin with a consideration of the *nature* of the asserted interest. It is clear that not every "interest" is protected by the Constitution and it is equally clear that the weight or importance of the interest is not determinative whether the interest qualifies as a "liberty" or interest in "property", as those terms are set forth in the Fourteenth Amendment. *Board*

of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Morrisey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 484 (1972). In *Morrisey*, Chief Justice Burger stated:

> "The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the liberty or property language of the Fourteenth Amendment." 408 U.S. at 471.

Earlier cases also furnish guidance. In *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), the Court suggested that the test was whether the interest for which protection was sought was a privilege ". . . long recognized at common law as *essential* to the orderly pursuit of happiness by free men." 262 U.S. at 399 (Emphasis supplied). Mr. Justice Cardozo, in *Palko v. State of Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937), held that the question was whether failure to grant due process would violate a *fundamental* principle ". . . which lies at the base of all our civil and political institutions." 302 U.S. at 328. The emphasis on "fundamentality" has continued to receive the endorsement of this Court. See *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1972); *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); and *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1960).

Prior to *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), this Court had never considered the question whether public education itself constitutes a fundamental right afforded protection under the Federal Constitution. Of course, there have been many instances where this Court was called upon to invoke the provisions of the Federal Constitution in the public school context—however, those cases involved rights other than to public education itself. Thus, on many occasions, the Court has acted to protect interests of individuals affected by action taken by public school officials where those interests involved fundamental rights such as speech,

association and racial equality. See, e.g., *Healy v. James*, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Tinker v. Des Moines Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

There are no such independent, specifically identifiable federal constitutional rights involved in this case *Strickland v. Inlow*, 485 F.2d at 192 (dissenting opinion). Rather, the question here is identical to that described by Mr. Justice Powell in *Rodriguez* as follows:

> "It is this question—whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution—which has so consumed the attention of courts and commentators in recent years." 411 U.S. at 29.

That issue arose in *Rodriguez* in connection with the Court's determination of the proper standard by which to review the constitutionality of state legislation which allegedly involved violations of the Fourteenth Amendment's Equal Protection Clause. In order to determine whether to apply the "compelling interest" test or the "rational basis" test, the Court was required to determine the proper characterization of the nature of the interest in public education.

After lengthy analysis which conceded the vital importance of education and reiterated the Court's dedication to the concept of public education, the Court concluded that, notwithstanding its undisputed importance, education itself is not an interest protected by the Federal Constitution. Mr. Justice Powell stated:

> "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal

protection of the laws. Thus the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. (Citations omitted.) 411 U.S. at 33.

"Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a state's social and economic legislation. *Ibid* at 35.

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We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive. . . ." *Ibid* at 37.

Although *Rodriguez* was the first occasion on which this Court had faced the precise issue concerning the nature of public education in the constitutional scheme, the conclusion in *Rodriguez*, that education is not a federally protected interest, is supported by other authority.[10] In *Flemming v. Adams*, 377 F2d 975

[10] " 'Education, by contrast, presents a more difficult task for justification of active review. Certainly, judicial competence to deal with the complex problems that plague educational institutions is open to serious question. Moreover, the difficulties of giving effect to decisions in this area are enormous. Unlike voting and fair criminal procedure, education is not an interest which has long been recognized to be of pre-eminent importance. Nevertheless, the pivotal position of education to success in American society and its essential role in opening up to the individual the central experience of our culture lend it an importance that is undeniable. Even so, education does not seem quite so fundamental as rights of criminal defense and voting. Developments in the Law Equal Protection, 82 Harv.L. Rev. 1065, 1129 (1969).' " *Grier v. Bowker*, 314 F. Supp. 624, Note 1 at 626 (S.D. N.Y. 1970).

(10th Cir. 1967), the Court of Appeals for the Tenth Circuit rejected the argument of a minor student and her mother that the child's right to education was federally protected. The Court stated:

"The appellant argues that a right to an education is one of the rights secured to her by the United States Constitution, and that the Board deprived her of that right by refusing to approve her application for special education services. Although the importance of education to our democratic society is obvious to all, *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), we do not agree that the right to an education is among those rights guaranteed by the federal Constitution."

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"The United States Constitution does not secure to the appellant the right to an education; rather the Constitution secures the appellant's right to equal treatment where the state has undertaken to provide public education to the persons within its borders." 377 F.2d at 977.

Thus, the plaintiffs' suit under § 1983 was dismissed. See also *Byrd v. Sexton*, 277 F. 2d 418 (8th Cir. 1960) where, while a Judge on the Court of Appeals for the Eighth Circuit, Mr. Justice Blackmun wrote the opinion dismissing a pupil's § 1983 suit alleging a civil right violation arising out of the imposition of an enrollment fee. The Court there held that the right asserted "is not one secured by the Fourteenth Amendment and affords no basis for a suit brought under the sections of the Civil Rights Acts relied upon . . . ." 277 F.2d at 424. It was held that whatever cause of action the plaintiff might have, it was one involving the invasion of personal rights for

which state laws and state forums provided the avenues of relief. Finally rejecting the plaintiffs' reliance on *Brown v. Board of Education, supra*, Mr. Justice Blackmun stated:

> "It is perhaps initially to be observed that the language quoted from *Brown* implies certain limitations. Neither that language nor the holding itself prescribes as a *federal* right the availability of education, let alone free education, through state facilities. The opinion stands for the proposition that only 'where the state has undertaken to provide it', the opportunity of an education 'is a right which must be made available to all on equal terms'." 277 F.2d at 425.

Mr. Justice Black accurately prophesied the *Rodriguez* holding in his remarks stated in *Karr v. Schmidt*, 401 U.S. 1201, 91 S.Ct. 592, 27 L. Ed. 2d 797 (1971):

> "I refuse to hold for myself that the federal courts have constitutional power to interfere in this way with the public school system operated by the states. And I furthermore refuse to predict that our court will hold they have such power. It is true that we have held that this court does have power under the Fourteenth Amendment to bar state public schools from discriminating against Negro students on account of their race, but we did so by virtue of a direct, positive command in the Fourteenth Amendment, which like the other Civil War Amendments, was primarily designed to outlaw racial discrimination by the states. There is no such direct, positive command about local school rules with reference to the length of hair state school students must have. And I cannot now predict this court will hold that the more or less vague terms of either the Due Process or Equal Protection Clause have robbed the states of their traditionally recognized power to run their school systems in accordance with their own best judgment as to appropriate length of hair for students." 401 U.S. at 1202.

See also *Steier v. New York Education Commissioner*, 271 F.2d 13 (2d Cir. 1959) cert. denied 361 U.S. 966; *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961) (dissenting opinion) cert. denied 368 U. S. 930. And cases subsequent to *Rodriguez* have held education to be beyond the scope of federally protected rights. *Sturgis v. State of Washington*, 368 F. Supp. 38 (W.D. Wash. 1973) affirmed 94 S.Ct. 563; *Stock v. Texas Catholic Interscholastic League*, 364 F. Supp. 362 (N.D. Tex. 1973); *Houston v. Prosser*, 361 F. Supp. 295 (N.D. Ga. 1973).

In the case under consideration on this Petition, the Court of Appeals for the Eighth Circuit did not even mention in its opinion the issue whether these students' claim properly asserted an interest protected by the Constitution or § 1983. The issue *was* emphatically raised by Chief Judge Mehaffy who, joined by two other Circuit Judges, dissented from the denial of the Petition for Rehearing en banc. He stated:

> "I cannot agree . . . with the panel's conclusion that the due process clause of the Fourteenth Amendment empowers this or any other federal court to review every public school disciplinary action on the basis of sufficiency of the evidence. Instead, I am firmly convinced that the substantive reach of the due process clause on the public school campus is limited to the protection of specifically identifiable federal constitutional rights." *Strickland v. Inlow*, 485 F.2d 186, 191-92 (8th Cir. 1973) (dissenting opinion).

Moreover, in virtually every case where this Court has acted to protect truly fundamental constitutional rights asserted in the school context, cautionary language was employed concerning the propriety of federal court intervention in matter of public school administration. Thus, although "the vigilant protection of constitutional freedoms is nowhere more vital than in the com-

munity of American schools," *Shelton v. Tucker*, 364 U.S. 479, 487, 81 S.Ct. 247, 5 L.Ed. 2d 231 (1960), nevertheless this Court has ". . . repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with *fundamental constitutional safeguards*, to prescribe and control conduct in the schools." *Tinker v. Des Moines Community School District, supra* at 507 (Emphasis supplied). And in *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed 2d 228 (1968), this Court stated:

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and belief. By and large, public education in our Nation is committed to the control of state and local authorities. *Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.*" (Emphasis supplied.) 393 U.S. at 104.

Caveats such as that expressed in *Epperson, supra*, culminated in the Court's direct recognition, in *Rodriguez*, of the peculiarly local nature of the education function:

> "In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of intractable economic, social, and even philosophical problems. *Dandridge v. Williams*, 397 U.S. at 487." 411 U.S. at 42.

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> "It must be remembered also that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny. . . . '[T]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action.' (Citations omitted.)" 411 U.S. at 44.

Pointing out that both the majority and the dissenting opinions in *Wright v. Council of the City of Emporia*, 407 U.S. 451, 92 S.Ct. 2196, 33 L.Ed 2d 51 (1972) recognized the importance of local control of public education, the Court in *Rodriguez* called particular attention to Chief Justice Burger's remark that "[l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well." 407 U.S. at 478.

The educational issues here are perhaps not nearly so complex as those involved in *Rodriguez*. However, the Court there, in mentioning the various ways in which the State of Texas had exerted its legitimate interest in local control of its educational programs, made specific reference to the State's assumption of the power and responsibility "to maintain order and discipline . . . including the prerogative to suspend students for disciplinary reasons. . . ." 411 U.S. at 51-52. Note 108.[11] Although main-

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[11] Arkansas Act No. 169 of 1931, § 170 [Ark. Stat. Ann. § 80-1516 (Repl. 1960)] provides:

> "Suspension of pupils—Causes—Right to appeal.—The directors of any school district may suspend any person from school for immorality, refractory conduct, insubordination, infectious disease, habitual uncleanliness or other conduct that would tend

tenance of discipline may not appear a complex issue, it is nonetheless vital to public education. In *Laucher v. Simpson*, 28 Ohio App. 2d 195, 276 N.E. 2d 261 (Ct. App. Knox Co. 1971), it was observed:

> "Discipline is indeed a part of the educational process and we so hold.
>
> "Our system of public education, established to equip citizens with the skills they need to stay free under a rule of law must, if it is to succeed, thoroughly inform its students that the liberty and rights of all depend upon the willingness of the individual to discipline himself to respect the rights of others and that he learn to subordinate his individual desires when they conflict with the legitimate interests of others. Disciplined respect for the rights of others is essential to the survival of liberty." 28 Ohio App. 2d 198.

This sentiment was echoed by Mr. Justice Black in his dissent in *Tinker v. Des Moines Community School District*, 393 U.S. 503, 524, 89 S.Ct. 733, 741, 21 L. Ed. 2d 731, 743 (1969):

> "School discipline, like parental discipline, is an integral and important part of training our children to be good

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to impair the discipline of the school or harm the other pupils, but such suspension shall not extend beyond the current term. The board of directors may authorize the teacher to suspend any pupils, subject to appeal to the board."

The general powers and duties vested in Arkansas school boards were set forth in Act No. 169 of 1931 and the statute has been amended several times. In its current form, see Ark. Stat. Ann. § 80-509, it deals with, inter alia, the care and custody of grounds, buildings and property (Section a); the provision of school facilities (Section b); the employment of personnel (Section d); curriculum content (Section e); seeing to "the welfare of the pupils and encouraging them in their studies" (Section g); the handling of finances (Sections h, i, j); the provision of school supplies (Section k); the preparation of budgets (Section l); and the doing of "all things necessary and lawful for the conduct of an efficient free public school or schools in the district" (Section m). Other duties and responsibilities are covered by specific statutes.

> citizens—to be better citizens. Here a very small number of students have crisply and summarily refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not have to be a prophet or the son of a prophet to know that after the court's holding today, some students in Iowa schools, and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders." 393 U.S. at 525.

There are cases from lower federal courts which either explicitly or by implication, suggest that a student's right to education *is* federally protected. However, except where the holding is explicit, see e.g. *Lopez v. Williams*, 372 F. Supp. 1279 (S.D. Ohio 1973), probable jurisdiction noted 94 S.Ct. 1405, we contend that the suggestion resulted from a failure to recognize and distinguish situations involving deprivations of fundamental constitutional rights such as speech or assembly from those where no such specifically identifiable constitutional interests are involved. Federal Constitutional protection is of course due the former—but not the latter situations.

Cases such as *Ordway v. Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971) manifest an incredibly simplistic approach, coming to momentous conclusions without real analysis. The sole reference to the issue in that case was itself the conclusion reached.

> "It would seem beyond argument that the right to receive a public school education is a basic personal right or liberty. Consequently, the burden of justifying any school rule or regulation limiting or terminating that right is on the school authorities. Cf. *Richards v. Thurston*, 424 F.2d 1281, at 1286 (1st Cir. 1970) . . . ." 323 F. Supp. at 1158.

Richards v. Thurston, supra, however found not that "the right to receive a public education is a basic (constitutional) right or

liberty," but that the right of a student to control his personal appearance (hair length) was a protected personal liberty. We do not stop to consider the correctness of that conclusion,[12] but simply note that it does not support conclusion reached in *Ordway*.

More troublesome than cases such as *Ordway, supra*, is the recent decision in *Lopez v. Williams, supra*, now pending as *Goss v. Lopez* in this Court on an appeal from the decision of a three-judge panel. (O.T. 1973, No. 73-898) *Lopez* was a class action brought by certain students of the Columbus, Ohio public schools challenging the constitutionality of their suspensions from school. 372 F. Supp. at 1292. In its approach to deciding whether school authorities were obliged under the Constitution to afford procedural due process in suspension procedures, the Court first stated:

> "The Supreme Court has not resolved the question of whether a student's statutory right to an education is a liberty which is protected by due process of law. . . ." 372 F. Supp. at 1297.

Then, in a strained analysis, the District Court attempted to distinguish the Court's holding in *Rodriguez*:

> "Recently in *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L. Ed. 2d 16 (1973), the Supreme Court was presented with the question of whether differential State aid to local school districts violates the equal protection clause of the Fourteenth Amendment. The Court, in determining whether the rational basis test . . . or the compelling state interest test . . . should be applied to the legislative scheme, stated that the right to an education was not explicitly or implicitly guaranteed by the Constitution. Consequently, the Court applied the rational basis test, not the compelling state interest test. *San Antonio School District v. Rodriguez*, 411 U.S. at 29, 93 S.Ct. 1278, *supra*.
>
> "The Supreme Court's holding that the right to an education is not explicitly or implicitly guaranteed by the Constitution does not affect the determination of whether it is a liberty or property which can not be interfered with by the State without the protection of due procedural safeguards. As noted above, interests included within the concepts of liberty and property are often rights created by the State which have no constitutional status (footnote omitted).
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> "The question presented is whether the State created right to an education is a protected liberty under the Fourteenth Amendment's due process clause (footnote omitted)." *Ibid* at 1298-99.
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> "Considering the importance of education in our society today, the Court holds that the state created entitlement to an education is a liberty protected by the due process clause of the Fourteenth Amendment." *Ibid* at 1300.

We earnestly submit that Lopez (and the similar implicit holding in this case) is erroneous and an inexplicable evasion of this Court's clear holding in *Rodriguez*. First, *Lopez* may be technically correct in stating that this Court has not specifically held that the right to an education is, or is not, protected by the *Due Process Clause*. However, the Court's language in *Rodriguez* clearly states that education is not protected by *the Federal Constitution*, which would seem to encompass the entire document, including not only the Equal Protection Clause there involved but also the Due Process Clause. We again call attention to the exact language of *Rodriguez*:

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[12] Compare *Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972) (en banc) and *Freeman v. Flake*, 448 F.2d 258 (10th Cir. 1971), cert. denied 405 U.S. 1032 with *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971).

"It is this question—whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution—which has so consumed the attention of courts and commentators in recent years. (footnote omitted)" 411 U.S. at 29.

* * * * * * *

"Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." 411 U.S. at 35.

* * * * * * *

"We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive." 411 U.S. at 37.

Secondly, it should be pointed out that, contrary to the suggestion implicit in *Lopez*, a decision that a particular interest is not fundamental and thus not within the protection of the Equal Protection Clause should at least be highly probative of whether that interest is encompassed within the Due Process Clause and vice versa. See *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954) holding that segregated education was just as unlawful under the due process clause as it had been held to be under the equal protection clause in *Brown v. Board of Education, supra*. Although the two concepts are not always "interchangeable," they are not mutually exclusive, with "both stemming from our American ideal of fairness . . .," and with equal protection being a "more explicit" safeguard. *Bolling v. Sharpe*, 347 U.S. at 499. See also *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S.Ct. 705 (1973) where this Court found a violation of the due process clause of the Fourteenth Amendment present in the Texas State Criminal Abortion Statutes. In determining the constitutional validity (under the Due Process Clause) of various portions of the

statutory scheme, the Court gave consideration to the "compelling state interest" test which originated in connection with alleged violations of the Equal Protection Clause.[13] And in determining the nature of interests protected by the Due Process Clause, this Court in *Morrisey, supra*, employed the same approach to analysis as did *Rodriguez*. Both cases indicated that constitutional protection is not afforded simply because the interests are important. *Morrisey*, 408 U.S. at 471; *Rodriguez*, 411 U.S. at 33-34. Also, apparently referring to the Due Process Clause, Mr. Justice Stewart noted in his concurring opinion in *Rodriguez*:

"Moreover, *quite apart from the Equal Protection Clause*, a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classifications." (Emphasis supplied) 411 U.S. at 61.

* * * * * * *

". . . [t]he Texas system impinges upon no substantive constitutional rights or liberties." *Ibid* at 62.

Lopez is clearly contrary to the rationale of *Rodriguez* in its treatment of whether the right to a public school education is fundamental and therefore protected by the liberty or property language of the Fourteenth Amendment. It is interesting to note that, in declining to draw a distinction between a student suspension and a student expulsion and to thereby afford constitutional coverage to one but not the other, the Court stated "The right to an education . . . *either is, or is not* a liberty under

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[13] In fact, Mr. Justice Rehnquist, in dissent, characterized the Court's approach in *Roe* as ". . . transposing it (the compelling state interest test) from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment." 410 U.S. at 173.

the Fourteenth Amendment." 372 F.Supp. at 1300 (Emphasis is supplied). The Court then disregarded its own observation and held that, while the right to education may not be a liberty under the equal protection clause (per *Rodriguez*) it would nevertheless be treated as a liberty under the due process clause.[14] That anomalous result cannot be permitted to stand in light of the clear and comprehensive inquiry in *Rodriguez* as to the proper characterization of the interest in education and its ultimate holding that the interest is one committed to the protection of the states. Nor can the *sub silentio* holding of the Court of Appeals in this case—that the plaintiffs have established deprivation of an interest protected by the Constitution—be sustained.

2. **The concept of substantive due process is inapplicable to a school board's decision to suspend a student for the balance of a school term.**

As has been previously pointed out, the Court of Appeals for the Eighth Circuit in this case never expressly considered whether the plaintiffs had been deprived of a liberty or property interest protected by the due process clause of the Fourteenth Amendment. Rather the Court "skipped over" that question and instead invoked the doctrine of substantive due process to invalidate the Mena School Board's suspension decision without discussing whether a federal right was involved. The Court's substantive due process holding rests on its conclusion that the school board's finding of a violation of its rule prohibiting the possession or use of intoxicating beverages at school or at a school sponsored function was erroneous. The Court reasoned that since the beverage involved had not been established to have been an "intoxicating" one, no violation of the rule had been shown, even though the girls admitted that the beverage was in fact "alcoholic." 495 F.2d at 190.

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[14] *Lopez* does concede that education is not a "property" interest protected by the Constitution. 372 F.Supp. at 1299, Note 16.

In response to that holding by the panel, Chief Judge Mehaffey stated, in dissenting from the denial of the petition for rehearing en banc:

> "My principal disagreement with the panel's opinion involves its use of substantive due process as the basis for reversal. • • • I cannot agree . . . with the panel's conclusion that the due process clause of the Fourteenth Amendment empowers this or any other federal court to review every public school disciplinary action on the basis of sufficiency of the evidence. Instead, I am firmly convinced that the substantive reach of the due process clause on the public school campus is limited to the protection of specifically identifiable federal constitutional rights."
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> ". . . I thought the federal judiciary had long since rejected such a free-wheeling use of 'substantive due process' because it inevitably had led to an unwarranted invasion of the duties and responsibilities of state and local governments. E.g. *Ferguson v. Skrupa*, 372 U.S. 726 (1963). • • • I fear that the panel's opinion now places every federal court, at least in this Circuit, in the position of serving as a board of appeal for every disciplined public school student who feels that his punishment was too severe or that the school board's decision was not supported by substantial evidence. I feel that this function is one that is the sole responsibility of the state and local governments, which in this case have long provided an appropriate judicial remedy. E.g., *Douglas v. Campbell*, 89 Ark. 254, 116 S.W. 211 (1909)." 485 F.2d at 191-92.

It is the position of the petitioners here that since the right of a public school student to continued participation in a local educational program is not an interest protected within the liberty and property language of the Fourteenth Amendment Due

Process Clause, the concept of substantive due process is inapplicable to such a student's challenge to a disciplinary decision.[15] The only basis upon which a contrary conclusion could be reached, and substantive due process invoked to invalidate a decision comparable to that made by the school board involved herein, would involve a holding that every person has a federally assertable right to be free from *any* governmental action if it might be characterized as arbitrary, capricious or unreasonable. Yet, that conclusion is clearly not sound constitutional doctrine. See e.g. *Snowden v. Hughes*, 321 U.S. 111, 63 S.Ct. 397, 88 L. Ed. 497 (1944) ("A construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored."); *Gryger v. Burke*, 334 U.S. 728, 731, 68 S.Ct. 1256, 92 L. Ed. 1683 (1948) ("We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question."); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695, 69 S.Ct. 1457, 93 L. Ed. 2d 1628 (1949) ("It is argued that an officer given the power to make decisions is only given the power to make correct decisions. * * * We have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was was empowered to do so.").

Many cases have likewise refused to apply the doctrine of substantive due process in the school context where it was asserted that any arbitrary, capricious or unreasonable action taken by school authorities should be held invalid under the Federal Constitution. See e.g. *Jeffries v. Turkey Run Consolidated School District*, 392 F.2d 1 (7th Cir. 1974); *Scheelhaase*

[15] This argument presumes, as did the former one, that no "specifically identifiable," and thus admittedly protected, constitutional interest is involved.

v. Woodberry Central Community School District, 488 F.2d 237 (8th Cir. 1973); *Freeman v. Gould Special School District*, 405 F.2d 1153 (8th Cir. 1969). In fact, that was the very essence of this Court's reasoning in the non-tenured teacher cases where it was held that such a teacher had no protected federal interest and therefore no right to demand from school authorities a statement of the reasons for the non-renewal of teaching contracts, nor an opportunity to be heard in connection therewith. *Board of Regents v. Roth, supra; Perry v. Sindermann*, 408 U.S. 593, 33 L.Ed. 2d 570, 92 S.Ct. 2694 (1972).

Jeffries, supra, instructively states the issue and we submit, reaches the proper conclusion. There, a school teacher who admittedly had no constitutional right to procedural due process in connection with the non-renewal of her teaching contract, nevertheless filed suit under 42 U.S.C. § 1983 alleging that she was protected by the concept of substantive due process against "arbitrary and capricious" action of the school authorities. 492 F.2d at 2. Describing her Complaint, the Court states:

> "She makes no claim to tenure as a matter of state law, but does allege a violation of her constitutional rights because the defendants' decision was made 'for reasons which are arbitrary and capricious, being wholly without basis in fact or in logic.' " 492 F.2d at 2.

The Court's discussion proceeds:

> "The claim that a person is entitled to 'substantive due process' means, as we understand the concept, that state action which deprives him of life, liberty, or property must have a rational basis—that is to say, the reason for the deprivation may not be so inadequate that the judiciary will characterize it as 'arbitrary.' Since standards of 'irrationality' or 'arbitrariness' vary from time to time and from judge to judge, applications of the concept—indeed, the concept itself—have generated serious criticism of the judiciary and the judicial function. (footnotes omitted)

"In this case we need not appraise the viability of the concept, or the extent to which it authorizes federal judges to impose their own views about what is 'unrelated to the education process or to working relationships within the educational institution' upon locally elected school boards. (citing *Drown v. Portsmouth School District*, 451 F.2d 1106, 1108 (1st Cir. 1971)). For the same critical objection to any procedural due process claim by the plaintiff also forecloses her argument based on 'substantive due process.'

"The Fourteenth Amendment prevents the state from depriving any person of liberty or property without due process of law. As *Roth* squarely holds, the right to procedural due process is applicable only to state action which impairs a person's interest in either liberty or property. Certainly the constitutional right to 'substantive' due process is no greater than the right to procedural due process. Accordingly, the absence of any claim by the plaintiff that an interest in liberty or property has been impaired is a fatal defect in her substantive due process argument." 492 F.2d at 3, 4.

Likewise, the Court in *Jeffries* foresaw the same consequences as did Chief Judge Mehaffy in his dissent in this case if the concept of substantive due process were applied. The Court notes:

". . . Plaintiff seems to argue that, entirely apart from her position as a teacher, as a citizen she has a 'substantive right to be free from arbitrary and capricious governmental action.' . . . She does not identify the source of any such right, but necessarily must be contending that it is an interest in 'liberty' protected by the Fourteenth Amendment. . . . In practical terms, if her argument were valid, every time a citizen was affected by governmental action, he would have a federal right to judicial review." 492 F.2d at 4, Note 8.

The Court then concludes that no such result should follow, "in view of contemporary reluctance to embrace the concept of substantive due process." *Ibid.* See *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, — U.S. —, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973); *Truax v. Corrigan*, 257 U.S. 312, 344, 42 S.Ct. 124, 66 L.Ed. 254 (1921) (dissenting opinion of Mr. Justice Holmes.) The matter could not be more succinctly put than in *Murray v. West Baton Rouge Parish School Board*, 472 F.2d 438, 444 (5th Cir. 1973) where it is stated:

"In order to avoid any misinterpretation and even at the risk of redundancy, we conclude by emphasizing that the Constitution is not fenced out of the school grounds, but that every barb felt by students or parents in the school fence is not constitutionally offensive. Although we shall not hesitate to use our constitutional clippers where appropriate, we cannot forget that a public school principal retains considerable freedom to administer his realm. For better or for worse, *our jurisdiction attaches only when the Constitution has been violated—not every time a principal acts arbitrarily or unfairly*. In affirming the dismissal of this claim we are in no way passing on the propriety or wisdom of the disciplinary and testing practices of West Baton Rouge Parish. We merely held that on the facts of this case, plaintiffs have totally failed to prove a deprivation of any constitutional right." (Emphasis supplied).

The potential consequences of the substantive due process holding by the Court of Appeals in this case may well have been understated by the dissenting opinion of the three Judges who would have granted rehearing. According to the Amicus Curiae Brief filed in *Goss v. Lopez, supra*, by the various interested Ohio Associations, the school districts in Cincinnati, Akron and Cleveland alone suspended a total of 26,004 students in the 1972-73 school year. Amicus Curiae Brief of the Buckeye Association of School Administrators, et al. p.2 (O. T. 1973, No. 73-898). What if only an insubstantial percentage

of the nation's suspended students filed §1983 damage actions alleging an excessively severe punishment or an arbitrary decision? And why, if the right to education is federally protected, confine §1983 claims to *suspended* students—what of students who claim violations of substantive due process (arbitrariness) in the administration of corporal punishment, Cf. *Gonyaw v. Gray*, 361 F. Supp. 366 (D. Vt. 1973), or in the exclusion from interscholastic sports, Cf. *Kelly v. Metropolitan County Board of Education*, 293 F. Supp. 485 (M.D. Tenn. 1968), or even the manner in which a student was given a failing grade, Cf. *Connelly v. University of Vermont*, 244 F. Supp. 156 (D. Vt. 1965)? Petitioners submit that this Court has already "drawn the line" to prevent that encroachment on the functioning of public school districts, and indeed, on the federal judiciary itself. *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973).

II. A Public School Board Member Sued in His Individual Capacity by a Student Alleging a Cognizable Claim Under 42 U.S.C. §1983 Is Immune From Liability for Money Damages.

A. Common law official and sovereign immunities remain viable defenses in §1983 suits.

It is clear that 42 U.S.C. §1983 does not prevent defendants in civil rights suits from invoking as defenses the traditional common law doctrines of sovereign and official immunity from liability. See e.g. *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed. 2d 288 (1967); *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). In recent §1983 cases, this Court has affirmed the continued viability of the sovereign immunity defense under the Eleventh Amendment,[16] *Edelman*

[16] "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

v. Jordan, — U.S. —, 39 L.Ed. 2d 662 (1974) and the common law "executive" or "official" immunity defense, *Scheuer v. Rhodes*, — U.S. —, 40 L.Ed. 2d 90 (1974) (discussing both official immunity and the Eleventh Amendment defense). Thus in *Edelman*, the Court held:

> "But it has not heretofore been suggested that §1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself. Though a §1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief. *Ex parte Young supra*, and may not include a retroactive award which requires the payment of funds from the state treasury, *Ford Motor Co. v. Department of Treasury, supra*."
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> 39 L.Ed. 2d at 680.

The Court there reversed that portion of the District Court decree which ordered the Director of Illinois Department of Public Aid to make retroactive payment of benefits ultimately deemed to have been wrongfully withheld. That result followed even though the State itself was not a party to the litigation and the money damage award was entered against the individual state officer defendant, since the money award would obviously not be paid out of the pocket of petitioner Edelman," 39 L.Ed. 2d at 673 citing *Rothstein v. Wyman*, 467 F.2d 226 (2nd Cir. 1972), cert. denied, 411 U.S. 921 (1973), and was deemed in reality a charge against the State itself, prohibited by the Eleventh Amendment.

The official immunity defense has also been given considerable recent attention by federal courts hearing §1983 cases. The general considerations involved in the doctrine were discussed in

Scheuer v. Rhodes, supra, and the original rationale of the immunity as:

> "(1) The injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; [and] (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." 40 L.Ed. 2d at 99.

As the doctrine evolved, it became clear, as stated in *Scheuer v. Rhodes, supra,* that the principal policy consideration pervading its development was in the need for prompt, conscientious decision-making by persons in positions of official responsibility:

> "Public officials, whether Governors, Mayors or police, legislators or judges who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. (footnote omitted) Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." 40 L.Ed.2d at 99-100.

One of the most important considerations justifying immunity was expressed by Judge Learned Hand in *Gregoire v. Biddle,* 177 F.2d 579 (2nd Cir. 1949):

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous

> to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that *to submit all officials . . . to the burden of a trial and to the inevitable danger of its outcome, would damper the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.* Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith." 177 F.2d 581. (Emphasis supplied).

We next consider the importance of the doctrines in the school context.

B. In the context of a suit by a student against a public school board member, the considerations justifying immunity from liability warrant recognition of an absolute immunity from liability for acts within the scope of his duty and authority.

Petitioners submit that immunity considerations are nowhere more important than in money damage claims against school administrators and board members in their individual capacity. We concede that remarkably diverse results have been reached in the lower federal courts, see e.g. *Blanton v. State University of New York,* 489 F.2d 377 at 382 (2d Cir. 1973), where the Court wryly remarks that the scope of official immunity, "is, to put it mildly, not pellucidly clear." The issue arose in *Smith v. Losee,* 485 F.2d 334 (10th Cir. 1973), on hearing by the Court of Appeals en banc, and the majority opinion of the Court there noted that the scope of the official immunity doctrine varies according to the nature of a particular official's duties and functions. 485 F.2d at 342. See also *Scheuer v. Rhodes, supra; Doe v. McMillan,* 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912

(1973); *Barr v. Mateo*, 360 U.S. 564, 573, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959). Noting that absolute immunity or privilege was afforded to legislators, judges, judicial officers and some executive officers, the Court then observed:

> "The doctrine is applied in a somewhat different form to other officials—a qualified privilege—whereby in an action it may be asserted as a matter of defense, but it is 'qualified' in that proof to support the defense is required. This proof is often lack of malice, or good faith, or some similar showing of good and proper cause for the act complained of. If such a defense can be established during the course of the trial, the jury or judge must then find for the defendant. This qualified privilege thus does not meet that element of the purpose of the rule that the official should not be required to expend time in the defense of litigation brought against him, but it is in accord with the other elements." 485 F.2d at 342.

In comment particularly appropriate to the instant case, it was stated:

> "Considering the purpose and reason for the doctrine as above expressed, it is applicable today with the complexity of government, with the growth of commissions and boards, and with broad and important duties and responsibilities assigned to such panels. *Many of the important governmental functions, especially those relating to various institutions, are placed in boards of local citizens who give their time and talents usually without compensation. This volunteer talent has come to provide a significant part of the important decision-making, policy-making functions in today's government.* These boards are supported by full-time and paid officials charged with the day to day administration of the particular institution or group of institutions." (Emphasis supplied.) 485 F.2d at 341.

Then with express reference to the public school context, the Court notes that this Court has never defined the official immunity doctrine in cases where school boards were defendants, and points out the different results that have been reached by the various Courts of Appeal facing the issue in school and other contexts. Compare *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) (refusing to recognize the privilege); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968) (conditioning successful invocation of privilege with a proper defense on the merits) and *Nelson v. Knox*, 256 F.2d 312 (6th Cir. 1958) (a "good faith" test). Concluding its analysis, *Smith v Losee, supra*, did observe that:

> "[T]he defendant members of the Board of Education are charged with broad duties and given extensive powers under the Utah statutes. These duties and powers, within their limited subject matter are not greatly dissimilar from those of a legislative body. They are required to formulate rules and regulations for the institutions to establish and announce policies on fundamental matters." 485 F.2d at 344.

However, despite a strong dissent, the majority held school board members entitled to only a qualified immunity to be established by an "affirmative showing" that the decision challenged was within the area of discretion bestowed by state law, made in good faith, without malice and supported by a "good and valid reason." 485 F.2d at 344.

Petitioners submit that both the ultimate holding in *Smith v. Losee, supra*, and the even greater restriction of the immunity defense by the Court of Appeals in the instant case (the immunity is conditional on good faith action, objectively determined without any requirement of malice), are erroneous, not appreciative of the considerations supporting immunity in the school context and amount to an immunization from liability

only where the school board members make "correct" decisions. See *Weddle, Damages Under § 1983: The School Context*, 46 Ind. L.J. 521 at 530, Note 56 (1970-71). The only manner in which one of the most vital immunity considerations, that recognized by Judge Hand in *Gregoire v. Biddle, supra*, can be protected is by an absolute immunity for school board members acting within the scope of their discretion under state law. Otherwise, any public school student can force a board member to trial on a money damage claim ". . . merely by catchall allegations of unfairness and mistake." *Palmigrano v. Mullen*, 491 F.2d 978 (1st Cir. 1974).

In his separate opinion in *Smith v. Losee, supra*, Judge Barrett argued for absolute privilege under the doctrine of sovereign immunity, utilizing a rationale similar to that of this Court in *Edelman, supra:*

> "In those states in our Circuit where the doctrine of sovereign immunity has not been abrogated insofar as official acts of members of a school board or board of education—trustees or educational administrators is concerned—I believe that the rule laid down in *State Highway Commission of Wyoming v. Utah Construction Company*, 278 U.S. 194, 49 S.Ct. 104, 73 L.Ed. 262 (1929) protects them from any personal liabilities because they serve as the state's alter ego and, of course, the state is not a 'person' subject to a Civil Rights suit under §1983. *Williams v. Eaton*, 443 F.2d 422 (10th Cir. 1971)." 485 F.2d at 346.
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> "I do not believe that the federal Civil Rights Act overrides the sovereign immunity grants recognized and nurtured in the wisdom of the legislative bodies and courts of the respective sovereign states, as guaranteed them by the federal Constitution (those powers not expressly granted to the United States are reserved to the states) and the protective armor of the Eleventh Amendment. In those states within our Circuit where the sovereign immunity doctrine is viable in relation to Boards of Education, school administrators, and other public officials, I would come down on the side of the states regardless of the fact that the action is based on the federal Civil Rights Act." *Ibid.* at 347.

Whatever its theoretical justification, be it the Eleventh Amendment sovereign immunity applied in *Edelman, supra*, or the concept of official immunity discussed in *Scheuer, supra*, the considerations of federal intervention in public school matters committed to local state authorities, and the nature of the public education interest itself, as discussed in *Rodriguez, supra*, dictate that the immunity of school board members who serve without pay should be absolute in cases where they act as a Board performing discretionary duties. See *Guelich v. Mounds View Ind. School District*, 334 F. Supp. 1276 (D.C. Minn. 1972); *Derby v. Univ. of Wisconsin*, 325 F. Supp. 163 (E.D. Wisc. 1971); *Abel v. Gousha*, 313 F. Supp. 1030 (E.D. Wisc. 1970); *Lessard v. Von Dale*, 318 F. Supp. 74 (E.D. Wisc. 1970); Cf. *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959).

The remarks of Mr. Justice Black in a different, but related context, are peculiarly appropriate here:

> "One does not have to be a prophet or the son of a prophet to know that after the Court's holding today, some students in Iowa schools, and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders."
>
> *Tinker, supra*, 393 U.S. at 525.

Nor is prophecy required to anticipate the effect of arming public school students with the right to seek money damages from board members of school districts furnishing their education. The deterrent effect on public-spirited citizens who might

otherwise actively seek office on a Board of Education, and dedicate his time and energies to a position of significant responsibility without financial reward of any kind, will be overwhelming.

C. **Even if absolute immunity from liability is not warranted, the defense of official immunity of public school board members in § 1983 suits for damages by public school students should be accorded a broad scope so as to deny recovery of financial damages except where the acts complained of are done with malicious intent.**

Should this Court deem absolute immunity inappropriate, with the result that the various elements of the immunity defense must be considered at trial, the successful maintenance of a money damage claim should at the minimum be conditioned on a showing that the defendants acted with malice. The District Court so held in this case—"Damages against a school district, a school administrator or a school board member should never be permitted unless they result from a malicious motive and action." *Strickland v. Inlow*, 348 F. Supp. 244, 250 (W.D. Ark. 1972). See *Smith v. Losee, supra* (opinion of Judge Barrett partially concurring and partially dissenting); *Holliman v. Martin*, 330 F. Supp. 1 (W.D. Va. 1971).

In his separate opinion in *Smith v. Losee, supra*, Judge Barrett argued for absolute privilege under the doctrine of sovereign immunity, 485 F.2d at 346-47, or absent that, *at least* a requirement that, in order for a civil rights plaintiff to avoid the immunity defense of school officials, he be required to prove that the latter performed a discretionary function with *malice*. *Ibid* at 347. Judge Barrett describes the consequences of the *Smith v. Losee* holding with recognition of the alarming results:

> "Neither a state nor its alter ego is a citizen or person subject to suit without its consent as required by the Eleventh Amendment. *State Highway Commission of Wyoming v. Utah Construction Company, supra*. And, of course, a state is not a person subject to a Civil Rights suit. *Williams v. Eaton, supra*. I observe that the State of Utah is not involved directly in this action. Because that State is not a *person* subject to suit relating to Smith' claimed deprivations, *I suggest that there is no constitutional authority whereby the State of Utah or any of its subdivisions or agencies may permissibly protect, either directly from the public treasury or via premiums for insurance coverage, any of the defendants-appellants from the subject damage judgment awards. Losee, Barnum and Peterson must pay Smith from their personal assets. The prospect is frightening to me . . .*" 485 F.2d at 349. (emphasis supplied.)
>
> * * * * * * *
>
> "The risk of personal judgments in the exercise of discretion relative to contract tenure and renewal confronting persons serving in administrative positions such as appellants Losee, Barnum and Peterson will almost certainly guarantee one result: Henceforth those in like positions shall not recommend against tenure or contract nonrenewal regardless of their good faith beliefs otherwise. They simply cannot afford to be wrong when error hits their pocketbooks personally. Such a result does not speak well for the future of our system. I must acknowledge that my concern relates to many officials serving in areas other than education." *Ibid* at 350.
>
> * * * * * * *
>
> "The majority opinion recognizes that there is little precedent for money damage judgments arising out of Civil Rights suits. Most of the relief granted is in the nature of injunctive or declaratory relief. A close examination of the *reported damage judgment award cases conveys a clear impression that the condemned acts were malicious in nature and performed in reckless and wanton disregard*

for the known rights of others. A person acting so abusively is not entitled to any immunity or privilege from a money judgment award. Such acts are maliciously motivated. . . . I see no justification for application of any less stringent standard of proof against the defendants-appellants in the case at bar." Ibid at 345 (emphasis supplied).

See also the following cases not involving school officials. *Gaffney v. Silk*, 488 F.2d 1248 (1st Cir. 1973):

> "Thus, while a § 1983 action for money damages may be maintained against such officials (the 'selectmen' of Randolph, Massachusetts), plaintiffs have the obligation to sufficiently allege and prove that defendant's conduct was either 'purposefully discriminatory,' *Harrison v. Brooks*, 446 F.2d 404 (1st Cir. 1971), 'knowing or reckless,' or 'willful,' *Ka-Haar, Inc. v. Huck*, 345 F. Supp. 54 (E.D. Wisc. 1972)." 488 F.2d at 1250-51.

John v. Hurt, 489 F.2d 786 (7th Cir. 1973):

> "Although it may be established under the pleadings that defendant made gross errors of judgment, we note that there is no allegation that his conduct was intentionally harmful to plaintiff, or otherwise deliberately inconsistent with his obligations to plaintiff so as to be a voluntary excursion outside the scope of his duties. See *Hilliard v. Williams*, 465 F.2d 1212, 1218 (6th Cir. 1972), cert. denied 409 U.S. 1029, 34 L.Ed.2d 322." 489 F.2d at 788.

It should be noted that although *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) held that § 1983 does not by its terms require proof of specific intent to deprive one of his civil rights, that holding has not dispensed with the necessity, in connection with an inquiry into the proper content of the immunity defense, to inquire into a public official defendant's state of mind. See *Jannetta v. Cole*, 493 F.2d 1334 (4th Cir. 1974):

> ". . . while there is nothing in § 1983 or the Fourteenth Amendment to suggest that an improper motive is requisite for a federal cause of action, conscientious state officials, when acting reasonably and in good faith, should not be expected to answer in money damages for failure to accurately predict the future course of constitutional doctrine, even though such failure may entitle a plaintiff to equitable relief." 493 F.2d at 1338.

See also *Kirstein v. Rector*, 309 F. Supp. 184 (E.D. Va. 1970) and *Tinker v. Des Moines Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L. Ed. 2d 731 (1969), where in his dissenting opinion Mr. Justice Harlan stated that public school students should be required to prove that the action of school officials was "motivated by other than legitimate school concerns." 393 U.S. at 526.

It is submitted that courts which pose the question of whether a "good faith" test should be "subjective" or "objective" obfuscate the real issue. Those opting for the "objective" criterion, as did the Court of Appeals in this case (See also *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968)) are actually exposing school officials to financial liability where they make "wrong" decisions, since they equate successful assertion of the immunity defense to a successful defense on the merits[17]—that is seemingly no immunity at all. On the other hand, cases prescribing a subjective good faith criterion seem to be utilizing a

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[17] *McLaughlin v. Tilendis*, 398 F.2d at 352:

> "At best, defendants' qualified immunity in this case means that they can prevail only if they show that plaintiffs were discharged on justifiable grounds. Thus here a successful defense on the merits merges with a successful defense under the immunity doctrine."

"malice" test but without the clarity which could be accomplished by expression of the test *as* one of malice. *Gaffney v. Silk*, 488 F.2d 1248 (1st Cir. 1973).[18]

This Court should accord school officials sued in their individual capacities an absolute immunity for discretionary acts within the scope of their duties or responsibilities. In the alternative, in order to provide such officials a reasonably coherent and intelligible standard by which the legality of their conduct will be judged, this Court should grant immunity to acts within the scope of their official authority, so long as the acts are done without malice.

CONCLUSION

Petitioners contend that the decision of the Court of Appeals for the Eighth Circuit should be reversed insofar as it found a violation of the students' rights of substantive due process and afforded such students an opportunity to recover money damages against them. The Complaint should be dismissed.

Respectfully submitted

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[18] ". . . it is the clear rule in this Circuit that liability will attach only where 'the defendants subjectively realized [that their action] would result in depriving the plaintiff of a right or privilege secured by the Constitution of the United States.' *Cobb v. City of Maulden*, 202 F.2d 701 (1st Cir. 1953)." 488 F.2d at 1251.

[redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1285

S. L. INLOW, DUDDY WALLER, JOHN P. WOOD, ED STEVENSON, RACHAEL GOFORTH, BOB PHILPOT, JIM AYLESHIRE, RAYMOND STROUD, BILL PLUNKETT, and MENA SPECIAL SCHOOL DISTRICT,

Petitioners,

vs.

PEGGY STRICKLAND, a Minor, by Mr. and Mrs. Virgil Justice, Her Parents and Next Friends; VIRGINIA CRAIN, a Minor, by Doris Crain, Her Mother and Next Friend,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to those cited by Petitioners there are the following:

Constitution, State of Arkansas, Article 14: As amended by Amendment Number 53 adopted in 1968:

NO. 53. ARTICLE 14, § 1 AMENDED

§ 1. *Free School System.* Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education. The specific intention of this amendment is to authorize that in addition to existing constitutional or statutory provisions the General Assembly and/or public school districts may spend public funds for the education of persons over twenty-one (21) years of age and under six (6) years of age, as may be provided by law, and no other interpretation shall be given to it.

Act No. 169, Acts of Arkansas for 1931, Section 165, page 146, compiled as Section 80-1501, Arkansas Statutes (1947) Annotated (1960 Replacement Volume 7, page 216):

§ 80-1501. *Age of students permitted to attend schools.*—The public schools of any school district shall be open and free to all persons between the ages of six (6) and twenty-one (21) years, residing in that district, and the directors of any district may permit older or younger persons to attend the schools under such regulations as the State Board of Education may prescribe.

Section 150 of Act No. 169 of 1931, cited above:

§ 80-1502. *Attendance, required of children aged seven to fifteen.*—Every parent, guardian, or other person residing within the State of Arkansas and having in custody or charge any child or children between the ages of seven (7) and fifteen (15), (both inclusive)

shall send such child or children to a public, private, or parochial school under such penalty for non-compliance with this section as hereinafter provided.

28 U.S.C. 1343 (3) and (4):

§ 1343. *Civil rights and elective franchise.*

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. 2201 and 2202:

§ 2201. *Creation of remedy.*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. *Further relief.*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

42 U.S.C. 1981 and 1983:

§ 1981. *Equal rights under the law.*

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1983. *Civil action for deprivation of rights.*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

QUESTIONS PRESENTED

1. Is a child attending a public school in Arkansas constitutionally entitled to some form of due process of law before being expelled from school for the balance of the semester?

2. If such child does have such rights of due process and equal protection, what are a child's remedies when denied those constitutional rights?

STATEMENT OF FACTS PERTINENT TO THE APPEAL

At the time the events transpired which gave rise to this litigation, the two Plaintiffs, Peggy Strickland and Virginia Crain, each was 16 years of age and were white, female students regularly enrolled and attending the 10th grade in the public schools of Mena, Polk County, Arkansas. Neither had ever required disciplining before, both were doing well in school and both held offices in the student organization of their Home Economics Class referred to as Future Homemakers of America (FHA). Virginia Crain was Secretary and Peggy was song leader and historian (A. 15 and 39).

On or about February 7, 1972 (A. 16), the FHA had planned a Mother-Daughter Panel Discussion for its program at its regular weekly meeting of mothers and daughters. Refreshments were traditionally served by the group at these meetings. Members of the group routinely alternated in preparation of the refreshments. It was the turn of Sandy Thomas (A. 16) to provide the punch for the February 7 meeting and Sandy forgot about doing it. This development was discovered during first period and

a group of the girls, made up of Sandy Thomas, Ginny Brown, Jo Wahl, Virginia Crain, Peggy Strickland, Patty Rackley and Debbie Philpot (A. 16 and 17) discussed the problem and the idea came up to spike the punch for the meeting. It caught on and all of the girls were for doing it. No one of them objected (A. 17).

There was the problem of what to get, where to get it and how to get it. By the time the third period arrived, these problems had been worked out and three of the girls, Jo Wahl, Virginia Crain and Peggy Strickland, obtained permission from the appropriate teacher, as well as money for purchasing supplies for the punch, left the campus in the automobile of Jo Wahl, drove to Cove, Arkansas, some 15 miles South of Mena, then West about 3 miles into the State of Oklahoma and there, at the drive-in window of a beer tavern, they purchased two 12 ounce bottles of a flavored malt liquor called Right Time, which is bottled especially for Oklahoma by Theodore Hamm Company, St. Paul, Minnesota (A. 93), and which contains 3.2% alcohol by weight (A. 94). Neither Virginia Crain nor Peggy Strickland had any idea what to buy for the purpose of spiking the punch. Jo Wahl is the girl who decided what to get and took care of the purchase (A. 18 and 19).

The girls then poured the two bottles of Right Time into a milk carton which they had taken along for that purpose (A. 19).

The girls then took the milk carton to Piggly Wiggly in Mena and purchased six bottles of King Cooler, a soft drink, 10 fluid ounce bottles, and poured those into the milk carton before going back to school (A. 19). At this point the girls had 84 ounces of liquid in the milk carton. They then returned to school and added enough water to make up 1½ gallons of punch, which was then put in the ice box (A. 19). By mathematical computation there were .768

ounces of alcohol in the mixture. If it were possible for one person's stomach to contain the entire 84 ounces at one time, it still would not have been enough alcohol to intoxicate him.

When the time came to serve the punch, Jo Wahl and Peggy Strickland brought it down from the Home-Ec room to the meeting room. Peggy Strickland was carrying the gallon jug and Jo Wahl was carrying the punch bowl. When the girls arrived at the meeting place with the punch, other girls in the class, knowing of the plan to spike the punch, wanted to taste it and commenced tasting it and commenced an excited exchange (A. 20) over the fact that the presence of the spiking agent could be detected. Peggy Strickland and Virginia Crain became alarmed and attempted to pour the punch out. Peggy ran outside with the jug intending to pour it out but before she could do so, other girls in the class, chased her screaming, "Don't throw that out, Peggy, don't pitch that out" (A. 21) and one of the girls, Cindy Thomson (A. 21), grabbed the jug away from Peggy (A. 22), and took it back into the meeting room. Peggy and Virginia would not thereafter go into the meeting and instead hid out between a dividing wall and had nothing more to do with the punch (A. 42 and 43).

No one at the meeting had any objection to the punch and no one had any reaction from it (A. 22).

Nothing further was heard about the incident until about 10 days later (A. 23) when the Home-Ec teacher, Mrs. Gladys Powell, commenced questioning some of the girls about the incident. When she inquired of Virginia and Peggy, together, they first denied any knowledge of it; however, when Mrs. Powell told them that if they would tell her the truth that she would handle the punishment herself, they told her the full story, including their participation in it (A. 23). This was on February 17, 1972. The

next day, however, Mrs. Powell called the girls back to her and told them that she did not wish to break her word but that the talk about the incident was "getting real loud around the school and that Mr. Waller (the principal) would probably find out anyway and her job would be on the line and she would just tell him to give us what we deserved" (A. 38), if the girls did not go themselves and tell Mr. Waller.

Under those terms, the girls had little choice but to go and throw themselves on the mercy of Mr. Waller, which they then did. The visit with Mr. Waller occurred during first period and he told them at that time that it would have to go before the Board (A. 24). Mr. Waller did not know anything about the product which the girls described to him (A. 59). Only one of them, Jo Wahl, purported to know anything about what it was and she said, erroneously, that it was 20% alcohol (A. 52).

Later in the day, Mr. Waller called the girls back to his office and told them that they would be expelled for one week and all extracurricular activities cut out and that they would be on probation for the rest of the year, that there would be a Board Meeting that night (A. 24 and 25) and that "you go home and tell your parents if you want to but, please, girls, don't let them get in contact with any of the Board Members . . ." (A. 25).

Peggy Strickland told her parents and her daddy intended to call Mr. Waller but Peggy admonished him that Mr. Waller had said that the parents should not contact any of the Board Members (A. 26). Virginia Crain, likewise, told her mother about Mr. Waller admonishing them that they should not contact any of the Board Members (A. 45). Accordingly, the parents did not contact any of the Board Members and did not attend the meeting. No notice of the meeting was given to the parents and no invitation was given to them to attend (A. 62).

The Superintendent is the Secretary for the Board and routinely gives notice to the Board Members and public news media of special Board Meetings. The telephone numbers of the parents were equally available to Mr. Inlow, the Superintendent, as were the telephone numbers of the Board Members (A. 62). It would have been no trouble at all to call the parents (A. 62).

A basketball game was scheduled for high school that evening and the School Board Meeting was called to follow the basketball game. It commenced at 9:30 o'clock P.M. (A. 105). Members present were Ed Stevenson, Raymond Stroud, Rachael Goforth, Jim Ayleshire, Bob Philpot, Bill Plunkett, Superintendent S. L. Inlow, high school principal P. T. Waller and Home Economics teacher Gladys Powell. One member of the public was present, a Mr. Jim Barton (A. 105). The main order of business was the disciplining of the three girls (A. 62).

At the beginning of the meeting the Defendant, S. L. Inlow, introduced Mrs. Curtis Powell, the Home-Ec teacher, and the Defendant, Duddy Waller, and told the Board that these two teachers were familiar with the details and would furnish the information to the Board (A. 63). No other witness was present (A. 63). No other person attempted to furnish any information to the Board. Mrs. Curtis Powell had witnessed nothing herself and merely related to the Board that the girls told her they had put an alcoholic beverage in the punch (A. 53).

The only other witness was the Defendant, Duddy Waller, and he again merely repeated to the Board what the girls had told him. Neither he nor Mrs. Powell had made any independent investigation to determine what the facts were. Neither was familiar with the particular type of so-called "alcoholic beverage" named (A. 52, 53, 63) to them by the girls. Likewise, the Board made no investiga-

tion of its own as to what type of so-called "alcoholic beverage" had been acquired by the three girls nor as to how much of it they had allegedly placed in the punch (A. 54, 63, 73, 75, 76 and 77).

After making their report to the Board of the information given them by the children both teachers, Mrs. Curtis Powell and the Defendant, Duddy Waller, recommended to the Board that the Board show any leniency which it felt it could toward the girls (A. 63, 106). At this stage of the proceeding, a telephone call came into the Board Meeting room and the call was answered by the Defendant Inlow. The call was from another teacher (A. 64) of Mena High School, Mr. Curtis Powell, a science teacher, and husband of Mrs. Gladys Powell, the Home-Ec teacher who was appearing as a witness before the Board, and Mr. Curtis Powell reported in his telephone call to Mr. Inlow that some person had reported to him, Mr. Powell (A. 64), that Jo Wahl (A. 65), one of the three girls then under consideration, had been involved in an altercation earlier that evening, following the basketball game and prior to the Board Meeting, and apparently while the crowd was leaving the basketball game at the gymnasium, with one of the children who had informed on the Plaintiffs and Jo Wahl. No mention was made by Mr. Curtis Powell of either Peggy Strickland or Virginia Crain.

Mr. Curtis Powell had not witnessed such altercation himself but merely had been told about it by someone else. Mr. Curtis Powell knew that the Board was having its meeting then for that purpose because he knew his wife was one of the teachers appearing before the Board as a witness against the three girls.

After receiving this information from Mr. Curtis Powell, and knowing that only Jo Wahl was the one reported by hearsay upon hearsay to have participated in an

altercation that evening, the Defendant, S. L. Inlow, nevertheless withheld that name in reporting to the Board (A. 65, 74). The report of S. L. Inlow to the Board was that the call was from a teacher reporting that one of the three girls under consideration had been involved in an altercation outside the gymnasium that evening. S. L. Inlow did not give the name of which girl it was, even though he had been told by Curtis Powell (A. 65).

Mrs. Curtis Powell, without asking which one of the girls was reported to have been involved, withdrew her recommendation as to all three girls, "washing her hands of the whole affair" (A. 65).

The Defendant, Duddy Waller, without asking which one of the three girls was reported to have been involved likewise withdrew his recommendation for leniency (A. 65).

The School Board, without asking which one of the three girls was reported to have been involved, expelled all three of the girls for the rest of the semester (A. 74).

The Defendant Inlow, knowing that only Jo Wahl was reported by hearsay upon hearsay to have been involved in the altercation, sat there and witnessed the turnabout of the two teachers and the action of the Board in expelling all three girls and never gave them the name of the one girl involved in the hearsay report, or even that Mr. Curtis Powell had given him the name of which one (A. 66).

The Board never apparently took any vote on the question. The Minutes of the Meeting (A. 105, 196) reflect the attitude of the Board that their rule was automatic, that it required no affirmative action by the Board and that without any such affirmative action the children were automatically suspended for the balance of the term. The attitude of the Board was that the only occasion for affirmative action would be in order to "grant leniency". The para-

graph of the Minutes (A. 106) which reflects the "action" of the Board on this question reads:

> "Mr. Stevenson asked the Board Members if anyone cared to make a Motion to grant leniency in the case or to change the application of the policy. There being no such motion, he ruled that the policy had been upheld and that the three girls: Joe Wahl, Peggy Strickland and Virginia Crain, be suspended from school for the remainder of the semester as required by Board policy."

The following morning, a Saturday, Mr. Waller called the residence of Peggy Strickland on the phone but did not mention the problem to her father and instead asked for Peggy, and told Peggy that he would like her to come to Mr. Inlow's office at 9:15 o'clock that morning and that she could bring her parents if she wanted to (A. 27). He likewise called Virginia, got her and asked her to come to Mr. Inlow's office, asked her "something about bringing my mother". The children and their parents met with Mr. Inlow, Mr. Waller, and Mrs. Powell (A. 28, 46). ". . . they just told us what the Board had decided and that we were expelled for the rest of the semester." (A. 28). Peggy's father asked if they could hold a special Board Meeting for reconsideration and Mr. Inlow stated "you can bring it up again at the next Board Meeting" (A. 28). There followed efforts by the parents and friends to get the children reinstated (A. 75, 77) which were unsuccessful. A special meeting was denied until the Plaintiffs employed an attorney (A. 137 and 138) at which time a special meeting was scheduled for March 2, 1972, at 7:30 o'clock P.M.

The Minutes of the Meeting of March 2, 1972, were kept by the Defendant, S. L. Inlow (A. 67). Prior to the meeting an effort was made to have Peggy Strickland's

homeroom teacher present, Mrs. Gazell (A. 66). She was contacted by Plaintiffs' Attorney and requested to attend. Thereafter, she talked with the Defendant, S. L. Inlow, and he advised her that she did not have to attend (A. 67). She did not attend.

At the commencement of the meeting the Board's Attorney, Mr. Joe Hardegree, presented a document referred to as "Facts Found By School Board". It is shown at Appendix 137 as Plaintiffs' Exhibit 14.

Nothing further was done or said by the Board at the March 2, 1972, meeting other than the presentation of this statement. Neither of the two teachers who were the only "witnesses" at the February 18 meeting were present, although they were both in the building (A. 60, 67). This fact was known to the board (A. 67) but was unknown to the Plaintiffs or their Attorney (A. 60). No witness whatever appeared before the Board (A. 37). The Petitioners have never been present at any time when anyone was purporting to tell the Board anything about what the Plaintiffs had done or what the Plaintiffs had told any of their teachers or supervisors about what they had done (A. 37, 38). Both of the Plaintiffs were suspended before they ever appeared before the Board (A. 38).

The Minutes demonstrate that no one spoke at the Meeting of March 2 except Mr. Stevenson, Mr. Hardegree, Mr. Core, Peggy Strickland, Virginia Crain, Mr. Ayleshire in making a motion and Dr. Wood in seconding the motion. See also Appendix page 9. The girls were faced with the stone-faced silence of a group of officials who had their minds set and whose reason was invulnerable to any approach.

Suit was filed four days later.

REPLY TO STATEMENT OF PETITIONERS

The statement of the Petitioners begins on page four of their brief.

In the first paragraph of that statement the Board brief states that the suspension of the Plaintiffs was "because of a school board finding that the students had violated a rule prohibiting possession or use of intoxicating beverages at school or at a school sponsored activity".

This statement is misleading.

The expulsion of the girls occurred as a result of a late evening meeting on February 18, 1972, held after a basketball game, without notice to any of the parents and without any of the parents or plaintiffs being present. See appendix page 105, stating that the meeting commenced at 9:30 o'clock P.M. The minutes of the meeting do not indicate that any finding whatever was made by the Board other than that the rule was automatic unless there was action by the Board "to change the application of the policy" (Appendix page 106). "There being no such motion, he (the president of the board) ruled that the policy had been upheld and that the three girls: Jo Wahl, Peggy Strickland and Virginia Crain, be suspended from school for the remainder of the semester *as required by Board policy* (Emphasis supplied)."

Apparently there was no motion to expel or otherwise. There was merely tacit agreement by all members of the Board that expulsion was automatic upon the receipt of a hearsay report from two teachers that the children had put "an alcoholic beverage into punch served to a group of FHA girls and some of their mothers".

This is a far cry from hearing evidence, permitting interested parties to speak and present information, listening to the children involved, investigating the seriousness and impact of the alleged offense, and making a "school board finding that the students had violated a rule."

The meeting was by no means a deliberative, fact-finding procedure.

On page 5 the Board brief states that "the three girls had admitted. . ." To use the term "admitted" gives a bad connotation to the information given to Mrs. Powell by the girls.

What actually happened was that Mrs. Powell promised the girls that if they would tell her what they had to do with "spiking the punch" that she, Mrs. Powell, "will try to punish you myself and handle it" (Appendix 23). On that promise the girls told her of the part which they had played in the prank. The next day Mrs. Powell had changed her mind. She called the girls back and "she did not want to break her word and say—you know, be a traitor and go back on us but that if it does get to Mr. Waller without us telling him that she is just going to say 'Slap it to them,' give them what they deserve." Thus we find Mrs. Powell on one day getting a confession out of the girls by assuring them that she will take care of it and that they will not be punished by anyone else. The next day we find Mrs. Powell threatening to turn against them if they do not go and tell Mr. Waller. This was an adult dealing with children.

Further on in the same statement, on page 5 of the brief, the Board says:

> ". . . they left the school grounds, traveled into the State of Oklahoma and there purchased at a tavern *several bottles* of a malt liquor beverage. . . (Emphasis supplied)"

The implication is that the girls purchased a large quantity of malt liquor (Appendix 48 is cited). Nowhere on Appendix 48 is any quantity of bottles mentioned. The girls have always said that they purchased two bottles. There has never been any suggestion from any source that they purchased any more that that (Appendix 19). Each bottle contained 12 ounces (Appendix 49). Therefore, altogether the girls purchased 24 ounces of the malt liquor. They did not purchase "several bottles".

Later on in the statement the Board mentions that "Mrs. Powell learned of the girls' action and upon confronting them with her information, the girls confessed their involvement". We have already discussed the circumstances of Mrs. Powell getting the information from the girls under a promise that she would handle the punishment and that it would go no higher. Far from being a "confrontation" this should be characterized as an illegal confession obtained by promise of benefit. The Board then says that "Mrs. Powell . . . later decided that the matter should be brought to the attention of . . . the principal." (Brief page 5). The Board brief should have made it clear that Mrs. Powell became scared that she would lose her job if she kept her word to the girls and that this personal fear caused her to intimidate the girls to go involuntarily to Mr. Waller (Appendix 38).

> "Q. Then why were you all influenced to go down and see Mr. Waller?
>
> A. Because she told us word was getting around and was getting real loud around the school and that Mr. Waller would probably find out anyway and her job would be on the line and she would just tell him to give us what we deserved."

Next, the Board brief says:

> "As it turned out, the Board met in special session that evening to consider the matter." (Brief page 5).

This makes it appear that the Board just casually met and that it just happened to work out that way. The evidence gives a different picture. The girls testified that when Mr. Waller suspended them he told them that he would call a Board meeting that night but that if the girls told their parents they should also tell the parents that the parents should not get in contact with any of the Board members (Appendix 25 and 45). There was no suggestion that either the girls or their parents could attend the meeting (Appendix 26 and 45). The implication was clear that the children and their parents were to stay away and not even contact the Board members until after the meeting was over (Appendix 26 and 45).

On page six of the brief the Board states:

> "The next day, February 19, 1972, the School Administrators met with the students and their parents to advise them of the action taken."

As a matter of fact, Mr. Waller called the residence of Peggy Strickland, got her father and asked to speak to Peggy and told Peggy to come to Mr. Inlow's office at 9:15 "and you can bring your parents if you would like to" (Appendix 27). When Mr. Waller called Virginia Crain's home he got Virginia and talked with her (Appendix 46). The Board makes no mention of the testimony that the people at the meeting, Mr. Waller, Mr. Inlow and Mrs. Powell, representing the school, maintained that the School Board policy was automatic and that there was no need to call the School Board back into session for any additional meeting (Appendix 28).

Following the foregoing quoted statement the Board brief then says:

> "Also, on February 24, 1974, the superintendent wrote to the parents advising of their right to petition the Board for reinstatement (A. 137-38, etc.)."

Not mentioned are the many attempts by the parents to get a special setting of the Board without success (Appendix 76, 77) and February 24, 1972, is the date on which the plaintiffs finally despaired and hired an attorney. The Board then decided that a special meeting could be held and called it at the request of the plaintiffs' attorney (Appendix 66, 106, 138).

The implication of the statements in the Board brief is that the Board was routinely and voluntarily providing a forum for the plaintiffs and their parents to be heard. The opposite is true.

On page 7 the statement deals with the meeting of March 2, 1972. It is not mentioned that there were no witnesses whatever presented by the Board at that meeting (Appendix 9, 37, 38, 46, 47). Although Mr. Waller and Mrs. Powell were in the building during the meeting, appendix 60 and 67, and although this was known to the Board and unknown to the attorney for the children, appendix 60, they were not called into the meeting room. Further, the homeroom teacher of Peggy, a Mrs. Gazell, had been requested to be present by the attorney for the children and after a conversation which she had with her superintendent, Mr. Inlow, and his advising her that she did not have to attend, she likewise was not present (Appendix 67).

The Board then says, on page 7:

> "The Board did make provisions so that, by a special course of instruction consisting of correspondence courses and increased course loads, the girls could graduate with their class." (Brief page 7).

Appendix 36 is cited. There is no such statement on that page. Peggy Strickland answered yes to a question as to whether or not she had been "told or shown" that she could finish with her class by taking correspondence courses. Appendix page 47 is cited and there Virginia Crain answered yes to whether or not the school counselor had "pointed out to you the way in which you can go ahead and complete school with your class." There is no testimony that the Board "did make provisions" for anything. There is no testimony that the high school gives any sort of correspondence courses or special courses of instruction or increased course loads. All credit for assuming and carrying a heavier burden goes to these children and certainly not to the Board which wrongfully created the necessity for the additional burden. For the Board to claim this credit which is rightfully due these girls, to the discredit of the Board, adds insult to injury.

The remainder of the statement is fair.

SUMMARY OF ARGUMENT

The respondents contend that a child attending a public school in the State of Arkansas is entitled to some form of due process of law before being expelled from school for the balance of the semester. It is not contended that such "due process" should be anything like as strict as is required for criminal cases where the punishment may involve deprivation of life, liberty or property. However,

expulsion from school, when accompanied, as in this case, with the making of a record of the fact of such expulsion and the maintenance of such record, and the reason stated for such expulsion on such record, portend such grave consequences for the affected child that reasonable notice to the child and his parents or guardian, with an opportunity to hear the proof adduced against him and an opportunity to rebut the same, and to prepare in advance for making such rebuttal, are absolute essentials before the infliction of such punishment. Such due process rudiments are to be afforded prior to the expulsion.

The District Court did not refuse jurisdiction in this case and neither did the Court of Appeals. A general order adopted by the United States District Court for the Western District of Missouri, for application in cases involving tax supported institutions for higher education, demonstrate very lucidly the legal authorities involved and the nature of the legal remedies. 45 F.R.D. 133.

Numerous cases decided in the Federal District Courts and Court of Appeal have treated in explicit detail the principles involved and virtually all of them acknowledge that cases of expulsion from the public schools fall within constitutional protections of due process and equal protection.

The recovery of damages in actions under 42 U.S.C., Section 1983 are specifically authorized against public officials acting in their official capacity and also in their individual capacity. The doctrine of official immunity is not available to the public official unless he has acted in good faith, objectively determined.

The Board has not contested the allowance of attorney's fees and additional attorney's fees should be assessed in this Court. *McBeth* v. *The Board of Education*, 300 F.Supp. 1270 (E.D. Ark. 1969).

ARGUMENT

Issues

The issue or issues in this litigation amount to a one plus one question. If the first question is answered in the negative, then it is the only question. If the first question is answered in the affirmative, then there is a second question. The first question is:

> IS A CHILD ATTENDING A PUBLIC SCHOOL IN ARKANSAS CONSTITUTIONALLY ENTITLED TO SOME FORM OF DUE PROCESS OF LAW BEFORE BEING EXPELLED FROM SCHOOL FOR THE BALANCE OF THE SEMESTER?

If indeed such child has no constitutional rights to due process and equal protection, then that ends the case and there is no second question. If such child does have such rights of due process and equal protection, then the next question is:

> WHAT ARE A CHILD'S REMEDIES WHEN DENIED THOSE CONSTITUTIONAL RIGHTS?

The School Board, in its Brief at page 14, commences its argument with an assertion that the Federal Courts do not even have jurisdiction to hear a case of this type.

The United States District Court for the Western District of Arkansas did not deny relief for lack of jurisdiction.

Early in the proceeding, the United States District Court recognized that the threshold issue was the validity of the rule itself. The Judge decided that issue at the first hearing, March 7, 1972, when he said:

> I don't find there is a thing unconstitutional in this manual. I think that it is completely constitutional (A. 81).

However, the District Judge then recognized that the second issue was also a constitutional one when he went on to say:

> If there is anything unconstitutional, it is the manner in which the Board has enforced it in this case (A. 81).

Earlier Judge Williams had said (A. 80):

> The Supreme Court of the United States has held over and over that the depriving of any student of school days can indeed cause very serious harm.

The learned Judge went on to say:

> It is not a part of the Court Order but I encourage the School Board to meet immediately and see if this matter can be resolved in a practical way. It would be a grave injustice if this were not an intoxicating (beverage) to keep two girls out because the School Board has made a mistake about it. . . . (A. 83, 84).

Even though the District Court denied the temporary injunction, the Court went on and entertained jurisdiction and ultimately held a trial which was to serve as a trial on the merits. However, at that trial, in the instructions, the District Court treated the case solely as one for damages and held that since the proof did not establish malice on the part of any Defendant that the Plaintiffs could have no relief of any kind, either for injunction, declaratory judgment, attorney fees, or damages, either compensatory or punitive (A. 34, Petition for Writ of Certiorari).

The Eighth Circuit Court of Appeals, in its review, held that there was jurisdiction in the Federal Courts in this case.

In 45 F.R.D. 133, the United States District Court for the Western District of Missouri adopted a general order on "judicial standards of procedure and substance in review of Student discipline in tax supported institutions of higher education". At 45 F.R.D. 133 the order dealt with jurisdiction as follows:

Jurisdiction

1. Under Sections 1343(3), Title 28, and 1983, Title 42, U.S.C., and also in appropriate cases under Sections 2201, 1331(a) or 1332(a), Title 28, U.S.C., the United States District Courts have jurisdiction to entertain and determine actions by students who claim unreasonably discriminatory, arbitrary or capricious actions lacking in due process and depriving a student of admission to or continued attendance at tax supported institutions of higher education.

The order went on to deal with the nature of the action to be brought as follows:

Nature of Action

2. The action may be
   (a) Under Section 1983, an action at law for damages triable by a jury;
   (b) Under Section 1983, a suit in equity; or
   (c) Under Section 1983 and Section 2201, a declaratory judgment action, which may be legal or equitable in nature depending on the issues herein.

It is true that the foregoing order dealt with colleges and universities which were tax supported. However, the

Court made a point of the fact that attendance at such tax supported institutions was not compulsory but was optional and voluntary. If there are constitutional rights against discriminatory, arbitrary or capricious actions lacking in due process by the administrators of those schools which can be attended voluntarily, then by force of greater reasoning there should be the same rights in those tax supported schools at which attendance is required. Nevertheless, as the Missouri Federal Court said, 45 F.R.D. 144:

> It is unimportant whether this protected opportunity is defined as a right or a privilege. The protection of the opportunity is the important thing.

Decisions of Federal Courts taking jurisdiction and exercising jurisdiction in cases of this type are legion. To cite only a few:

Dunn v. *Tyler Independent School District*, 327 F.Supp. 528 (U.S.D.C., E.D. Texas, Tyler Division, May 27, 1971);

Pervis v. *LaMarque Independent School District*, 328 F.Supp. 638 (U.S.D.C., S.D. Texas, Galveston Division, June 4, 1971);

Caldwell v. *Cannady*, 340 F.Supp. 835 (U.S.D.C., N.D. Texas, Lubbock Division, March 9, 1972);

Vought v. *Van Buren Public Schools*, 306 F.Supp. 1388 (U.S.D.C., E.D. Michigan, S.D., May 8, 1969);

Williams v. *Dade County School Board*, 441 F.2d 299 (5th Cir. 1971).

The tack taken by the Board in its Brief is that "a student's interest in continued participation in the education program conducted by a Public School District is not an interest protected by the Constitution of the United States."

Thereafter, the Board continues for fifteen pages of its Brief with an argument, the net effect of which is that a State can deny the benefit of enrollment in its public schools to these Plaintiffs and they have no recourse to the Federal Courts under the Federal Constitution. Although the Board cites many cases it comes back always to the decision of this Court in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). That, of course, is the decision of the Court in the case which sought to have declared invalid under the Federal Constitution the statutory system of the State of Texas for financing public education by an ad valorem tax by each school district on property within the district to supplement educational funds received by each district from the State.

There was discussion in the majority opinion as to whether or not education is a "fundamental personal right or liberty" 411 U.S. 38, and the conclusion of the majority opinion was in effect that it was not so much so as to require invalidation of the financing system created by the State of Texas for the very purpose of providing such education to its citizens, and doing so by "strict judicial scrutiny". However, the realistic basis for the distinction of the case from other cases dealing with educational questions is made clear at 411 U.S. 38 as follows:

> A critical distinction between those cases and the one now before us lies in what Texas is endeavoring to do with respect to education. Ibid. 38.

> Every step leading to the establishment of the system Texas utilizes today—including the decisions permitting localities to tax and expend locally, and creating and continuously expanding state aid—was implemented in an effort to *extend* (emphasis in original) public education and to improve its quality. Of course,

> every reform that benefits some more than others may be criticized for what it fails to accomplish. But we think it plain that, in substance, the thrust of the Texas system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution. Ibid. 39.

The School Board is reasoning from a case which called into question a system of public financing of educational facilities affirmatively created and extended to the citizens of Texas for their benefit. The entire program was positive and affirmative. It was created, designed, supported, and prosecuted for the purpose of making it available to the citizens. Nothing was being first extended and then withdrawn. No one was deprived of anything. The argument was that the system extended more to some than it did to others. There was no contention that it deliberately withdrew anything from anyone. The School Board offers the decision in that case as authority controlling this one. This is a case in which a School Board deliberately, intentionally, and effectively withdrew the educational facilities of the State of Arkansas from these two children. There is nothing in the Texas case which shields the School Board from Federal Jurisdiction in reviewing their actions in doing this. In the face of the multitude of Federal Court decisions taking jurisdiction in cases of this type, it appears that there can no longer be any serious question about Federal jurisdiction. It is obvious, of course, that not every collateral question involving schools and their administration will give rise to a Federal question. The School Board cites some of those decisions as authority for its position in this case. Further it is not contended that the School officials have no au-

thority at all to suspend or expel a student. It is merely contended that in doing so the School Board must treat the child as a human being and a citizen and must not deprive him of the opportunity to attend school without obedience to certain minimum due process requirements.

The following are some examples of those holdings. One such case is *Williams* v. *Dade County School Board*, 441 F.2d 299 (5th Cir. 1971).

There, the Court was concerned with a suspension of ten days followed by an additional suspension of thirty days, a cumulative forty days suspension. The Court said:

> It is more than a mere administrative device utilized to remove unruly students at a particularly tense time. Indeed, it is tantamount to the loss of a full term.

At another place the Court said (page 301):

> Nor are we concerned with the guilt or innocence of appellant. We focus only on the school's procedure for the disposition of the case. Further, we note that though the record indicates there may have been considerable disruption in the school at the time appellant was first suspended (for ten days) we are concerned with the imposition of the additional thirty day suspension which was given without benefit of an effective hearing and at a later time.

Pertinent to the type of minimum due process requirements which would be appropriate in school expulsion cases the Court said, beginning at the bottom of page 301:

> We realize, of course, that it is not necessary that students be given the kinds of procedural protections reserved for those accused of serious crime. Nevertheless, we feel that a penalty of this magnitude (expulsion of 40 days) ought not to be imposed without

proper notice of the charges, and at least an attempt to ascertain accurately the facts involved and to give the student an opportunity to present his side of the case.

Certainly, at least that much should be given to a student and his parents.

In this particular case, no effort whatever was made by Duddy Waller, S. L. Inlow, Mrs. Curtis Powell or any member of the Board, to check on the information of the three scared little 16 year old girls. Instead, all of these adults treated these three little girls as though they were alcoholic experts and proceeded to destroy one educational year on that basis.

No one inquired as to whether the children knew what they were talking about. No one asked to see a bottle of the drink which the girls said they had put into the punch. No one purported to know what it was, what it contained, whether it was intoxicating or not. No one inquired as to how much of it had been put into the punch, nor how much punch there was, nor what the alcoholic content, if any, was. In short, no one made any sort of investigation and practically no inquiry.

If any notice had been given to the parents, and if the parents had been permitted to attend, one can certainly be satisfied that all of these questions would have been gone into, that a sample of the alleged alcoholic beverage would have been acquired and investigated and it would have been determined whether the children actually had violated any rule or not.

As it was said by the United States Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 690, 98 L.Ed. 873 (1954):

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Another case in which the Court of Appeals of the Fifth Circuit required some due process safeguards involving college students is *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). The Court relied upon that decision in applying these safeguards to high school students in *Williams* v. *Dade County School Board*, 441 F.2d 299 (5th Cir. 1971).

The United States District Court for the Southern District of Florida relied upon the *Williams* case in *Tillman* v. *Dade County School Board*, 327 F.Supp. 930 (S.D. Fla. 1971). There the District Court held that the high school students had not been given due process and spelled out more clearly what such due process would require. Pertinent language of the Court appears at the following pages:

Page 933: With respect to the remaining issues, recent cases, interpreting old but good law, seem to have settled what was once subject to debate. In *Banks* v. *Board of Public Instruction of Dade County*, S.D. Fla. 1970, 314 F.Supp. 285, the court recognized the requirements set forth in *Dixon* v. *Alabama State Board of Education*, 5 Cir. 1961, 294 F.2d 150, and adopted that decision insofar as it required a notice of hearing. The hearing must include the rudimentary adversary elements: that a student subject to suspension for misconduct be given specific notice of the charges, the names of witnesses with a summary of their testimony, and the opportunity to refute the charges by oral or written testimony. The *Banks* court held, however, that the hearing need not be held prior to the suspension. Recently, in *Williams* v. *Dade County School*

Board, 5 Cir., April 5, 1971, 441 F.2d 299, this circuit noted that Banks sustained the constitutionality of that section of the School Board Policy-Regulation #5114 which allowed a ten day suspension by the principal without the benefit of a prior hearing, *but distinguished it from a 30 day suspension where such summary action could not be justified.* The court concluded that Williams should have been given a hearing which included the rudimentary adversary elements *prior* to the imposition of the additional 30 day suspension (Emphasis supplied).

* * *

Nevertheless, the parties have cured the silence of the record on these points by stipulation (1) that no information was furnished to the students named as Plaintiffs here or their parents as to the identity of witnesses whose testimony was the basis for such suspensions, and (2) that while the parents of each student who was suspended had the opportunity to confer with Principal Crabtree that opportunity was not afforded until after the imposition of the suspensions. *Williams* makes it quite clear that those students who were suspended for the additional 30 day period were entitled to a hearing prior to their being suspended. The severity of the 30 day suspension compels this requirement and more likely than not, as was the case in *Williams*, the need for suspensions without a hearing lessened in the days following the disturbances. (page 934) *Dixon, Banks* and *Williams* establish that all students who were suspended were entitled to be given the names of witnesses upon whose testimony the suspensions were based and a summary of what that testimony would be.

Another case substantially the same, on due process as the present case is that of *Vought* v. *Van Buren Public Schools*, 306 F.Supp. 1388 (E.D. Mich. S.D. 1969).

Pertinent language of the Court in that case appears at page 1393 as follows:

> It goes without saying, and needs no elaboration, that a record of expulsion from high school constitutes a lifetime stigma. It would seem that in taking an action of such drastic nature the Board of Education would have been interested in providing plaintiff with the opportunity to offer his explanation of the circumstances prior to the actual expulsion action by the Board. * * * Plaintiff claims he was entitled to a hearing. Defendants say he got one. Defendants refer to the board meeting when plaintiff appeared with his parents and his attorney. This was subsequent to the expulsion. Plaintiff had been presented with a *fait accompli* at this point.
>
> (3, 4) Our reading of the current bevy of reported cases has convinced us that plaintiff here was not treated fairly. The lack of fair treatment is such as to, in our opinion, constitute denial of due process to this plaintiff in these circumstances. He was entitled to the observance of procedural safeguards commensurate with the severity of the discipline of expulsion.

The trial judge was in error on March 7, 1972, in denying to these plaintiffs an injunction against their expulsion. Such injunction should have been granted and the school board should have been ordered to go back through the entire process in a constitutional manner in the same way that it was done in *Vought* v. *Van Buren Public Schools, supra.* If this had been done, then the plaintiffs would have been able to prove to the school board that they did

not violate the rule in question and that the expulsion was unfair and erroneous.

The complaint challenges the school board rule as being invalid on its face. This is in the paragraph numbered 10 and in the paragraph numbered 12.

The complaint contains its own argument. The rule is, by its language, mandatory. Punishment for either use or possession, regardless of degree or mitigating circumstances, "shall be" expulsion for the rest of the semester, whether that be one day or all of the semester except one day. This is unreasonable and arbitrary. It cannot stand. See *Calibillo* v. *San Jacinto Junior College*, 305 F.Supp. 857 (S.D. Texas 1969).

It seems that the rule is universally accepted in the Federal Courts that when a school board rule is challenged as depriving one of a basic constitutional right or liberty the burden of justifying such a rule limiting or terminating that right is one for the school authorities. *Richards* v. *Thurston*, 424 F.2d 1281 (1st Cir. 1970); *Ordway* v. *Hargraves*, 323 F.Supp. 1155, 1158 (D. Mass. 1971); *Breen* v. *Kahl*, 419 F.2d 1034 (7th Cir. 1969).

In the case of *Dunn* v. *Tyler Independent School District*, 327 F.Supp. 528 (E.D. Tex. 1971) certain black students staged a walk-out from the defendant school and thereafter were excluded from school until the students and their parents submitted to individual sessions between the student, his parents and a school official. Some of the students submitted to the individual interviews, which interviews amounted to interrogation by the school official as to the part played in the walk-out by the particular student. After the interviews the students were suspended on the basis of the information which they had given to the school official. Other students refused to submit to the

interviews and were excluded from returning to classes. Students in both categories were included as plaintiffs in the suit. The school authorities were acting under a regulation which provided in pertinent part as follows (page 533):

> Any student who participates in a boycott, sit-in, stand-in, walk-out or other related forms of distraction . . . shall by this action be subject to automatic suspension from school.

The Court held this regulation to be in violation of the Constitution in the following language:

> (5) The regulation in issue here fails in this particular, since it arbitrarily prohibits all boycotts, sit-ins, stand-ins, walk-outs without limiting its proscription to such activities involving misconduct or those which present a material and substantial disruption of the educational environment.

If the rule in *Dunn* v. *Tyler* was void then this one in this case is doubly so.

It is obvious from a reading of the regulation involved in this case (A. 102, Exhibit #A) that it is void on its face as requiring automatic suspension without regard to any mitigating circumstances of any type. Further, it is obvious from a reading of the Minutes of the School Board of its meeting of February 18, 1972 (A. 105, 196), that the School Board so considered its rule as being automatic and mandatory and requiring no action from the Board at all.

Under those circumstances there can be little doubt that the rule is invalid on its face, that the procedure by which it was enforced is invalid and that both the District Court and the Court of Appeals should have so held.

There are other cases holding that education is an interest protected by the due process clause.

Meyer v. *Nebraska*, 262 U.S. 390, 43 S.Ct. 625 (1923);
Bolling v. *Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694 (1954).

School Record

The rule involved in this case specifically provides:

> . . . suspension will be noted on the permanent record of the student along with reason for suspension.

In other words, a public record is made of the fact of the suspension and the reason for it just about the same as for a convicted criminal. Perhaps public school records are not public records in the sense of the deed records down at the courthouse, but it is traditional for prospective employers to request school transcripts and for institutions of higher learning, prior to admission of a student, to request certified copies of school transcripts. Likewise, the same can be subpoenaed and introduced in court when pertinent.

If a public record in this sense is going to be made and maintained by this school board of its suspensions and the reasons therefor, can the school board be heard to argue that the person suffering such suspension and the making of such record is not entitled to due process nor the protection of the Federal Constitution in the Federal Courts.

This type of a record is not only embarrassing and stigmatizing but can become a serious obstacle to obtaining needed employment or to being able to pursue further education. Further, it is in reality a form of defamation of reputation. To subject a person to this type of punishment certainly is required to conform to the requirements of due

process of law. *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510 (1971).

Included in the relief requested in this case by the Plaintiffs is an injunction against the making of such a record. See paragraphs numbered 16 and 3, both on Appendix page 11. The prayer against sanctions included barring the Defendants from making, maintaining or furnishing copies of such a record.

Reply to Questions Presented by Board Brief

The Plaintiffs do not consider the question numbered 1 and set out on page 2 of the Board's Brief as being involved in this case at all.

Several circumstances described in the question do not exist in this case at all. (1) Invalidation was not on the grounds of insufficiency of the evidence. It was on the basis of not requiring any proof at all. (2) There was no "possession or use of intoxicating beverages etc. . ." (3) The students do present claims of deprivation of fundamental constitutional rights. (4) The procedures utilized were held to violate due process requirements by the Court of Appeals, thus presumably that amounts to a ruling that they were unlawful. Therefore, it is the position of the Respondents that the question as phrased by the Petitioners is not involved in any way in this case.

Reply to Argument 2, Page 30, Petitioners' Brief

The effort of the Board under this Section is to charge the Court of Appeals with having added the School Board as the Court of initial jurisdiction and then having reviewed the action of the School Board as though it were the first Court in the jurisdictional chain. On this premise the Board rests its entire argument against the finding by

the Court of Appeals that substantive due process had been denied the Plaintiffs in this case. The Board relies heavily upon the dissent filed by Judge Mehaffy.

Judge Mehaffy, in his dissent, repeatedly attempted to characterize this case as one in which the Circuit Court of Appeals was passing on the sufficiency of the evidence before the school board and requiring the United States District Court to do the same thing. That view is entirely incorrect and misconceives the whole problem.

The problem was not with the evidence. The problem was with the procedure. There could be no problem with the evidence because there was no evidence. There was no hearing worthy of the name. There was no openminded consideration of anything except the hearsay version by Mrs. Powell and Mr. Waller of what the girls had said plus the hearsay upon hearsay reported by Superintendent Inlow on the telephone call he took on the night of the "secret meeting".

The simple truth is that the Board made a very serious mistake. Plaintiffs submit that the Board later realized what a serious mistake they had made and how bad it made them look; however, that rather than thereafter being big enough to admit that they had made a serious mistake, they have undertaken ever since to maintain that same stand in the hope that they will ultimately be approved in it and, thus, vindicated, perhaps, in their own estimation, but more importantly to them, in the eyes of the school patrons. From the time of the February 18, 1972, meeting the School Board has been preoccupied with its own image to the public and not with the interest of these Plaintiffs.

On the night of the "secret meeting" the School Board Members lost sight of the fact that the public schools are

created, financed and maintained, for the benefit of the school age children, and owe their very existence to the fact that there are school aged children. The schools do not exist for the benefit of the School Board directors nor the administrative staff nor the teachers. They exist only for the benefit of children. In this case, even if the children had been guilty of the terrible acts which the School Board apparently imagined, nevertheless, the interest of the School Board should have been directed toward rehabilitating the children and getting them back into the educational environment. Since the February 18, 1972, meeting the School Board has demonstrated a complete void of any such inclination.

Damages

This case was not filed as a damage suit. The original complaint, filed March 6, 1972, contained no prayer for damages, either compensatory or punitive (Appendix 6-12). The Motion for Preliminary Injunction filed with the Complaint, even though it did allege "irreparable injury, loss and damages to the plaintiffs," contained no prayer for damages (Appendix 12). At the time of the hearing of March 7, 1972, there was pending before the District Court no claim or prayer for judgment for money damages.

Although the District Court denied the prayer for temporary relief, the District Court did take jurisdiction for the purpose of considering whether or not the school board had proceeded in a constitutional manner.

> "You can have a constitutional rule and then if it is unconstitutionally applied or mistakenly applied it could do just as much harm to a pupil as if you had intentionally done something." (Appendix 80).

Therefore, jurisdiction was taken on the allegations of deprivation of constitutional rights and not on the basis of any claim for damages.

At that first hearing the District Judge had a great deal to say to the School Board about the manner in which they had proceeded, the severity of the judgment which they had pronounced, and the inconsequential nature of the alleged offense of the girls, the potential effectiveness of a more common sense approach of treating the incident as one of minor consequence and permitting the little girls to return to school.

The rather long lecture which the court gave to the Board at the end of the hearing, appendix 78 through 84, was so obviously an effort by the Judge to talk reason and common sense to the Board and to show them that they should open their minds to reason and work out a prompt way of getting the children back in school (Appendix 78 through 84).

Notwithstanding this counsel by the District Judge, three days later the defendants filed their joint answer taking the hard line, demanding strict proof of all allegations from the plaintiffs and praying that the complaint be dismissed.

It was four days later that the Motion to Amend the complaint was filed (Appendix 91-92) wherein the plaintiffs alleged damages inflicted upon them by the defendants in depriving them of their right to attend school, by forcing them to pursue some substitute means of education at their expense and inconvenience, and inflicting upon the plaintiffs humiliation and embarrassment by reason of the stigma attached to the expulsion, the making of a record of the unlawful punishment which would continue as a continuing source of harassment, intimidation,

abuse and embarrassment for the plaintiffs, and forcing the plaintiffs to engage in protracted and expensive litigation to protect their rights. Those allegations appeared in the paragraph numbered 1 of the amendment (Appendix 91) and in a separate paragraph, numbered 3 (Appendix 92), the plaintiffs alleged malice and wanton disregard of the rights of the plaintiffs.

On the basis of the allegations in the paragraph numbered 1 the plaintiffs prayed for compensatory damages. On the basis of the allegations contained in the third paragraph, the plaintiffs contended for punitive damages.

It was only after the District Court had denied the application of the plaintiffs for a temporary injunction restoring them to school attendance, and after the school board demonstrated its lack of response to the admonitions of the District Court by filing its answer, that the plaintiffs realized that they were not going to get back into school in time to pass the year's work. The Plaintiffs realized they would be involved in protracted litigation to establish their constitutional rights. They then concluded to and did move to add a count for compensatory damages and a count for punitive damages.

It has proved to be a tactical mistake for the plaintiffs.

In the first place, it permitted the school board to characterize the case as one only for damages. It permitted the School Board to characterize the children and their parents as being interested only in what they could get out of the case in money.

Secondly, it permitted the District Court to send the case to the jury on instructions which treated it as though it were a suit only for money damages.

Thirdly, it has now served as a bone of contention on an appeal to this Court.

When the plaintiffs filed their motion to amend the complaint to add the counts for damages, which filing was on March 14, 1972, the District Court took the filing of this motion as a development presenting another opportunity for the Court to counsel with the Board. Thus, the hearing of April 7, 1972, was on the motion of the plaintiffs to add the counts for damages. Again, the District Judge practically pleaded with the Board to go back to Mena and hold another meeting and let the children come before the Board and apologize and let the children return to school, as the Board had just done in a matter involving four boys that occurred after this suit was filed (Appendix 86 through 89). The report by Mr. Hardegree of April 12, 1972 (Appendix 90), was in response to the specific request of the Court. This report demonstrates that two of the Board members, Forest Ogden and J. M. Ayleshire, had heard the message of Judge Williams. However, the Board president, Mr. Stevenson, and three other members, Mrs. Rachael Goforth, Mr. Raymond Stroud and Mr. Bob Philpot, remained adamant. They had suspended the boys only two weeks for drinking beer but they refused to reinstate these girls after they had been out seven weeks. It was only after that report that the motion to amend the complaint was permitted.

The petitioners are not interested in persuading this Court nor any other Court to abolish the qualified immunity of public officials. No better brief on this subject could be written than the opinion of this Court in *Scheuer* v. *Rhodes*, ... U.S. ....., 40 L.Ed.2d 90 (1974). That opinion stands as the last word on the subject from this court and in that opinion, which did not involve members

of public school boards, the court set out the rule as follows:

> "These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords basis for qualified immunity of executive officers for acts performed in the course of official conduct."

The Board does not dispute the fact that 42 U.S.C., Section 1983 (Board brief page 3) authorizes a suit for damages, among other remedies. The general order of the United States District Court for the Western District of Missouri, reported in 45 F.R.D. 133, and referred to hereinabove, specifically includes, in its subdivision entitled "Nature of Action", that "The action may be (a) Under Section 1983, an action at law for damages triable by a jury."

Numerous Federal Court decisions have permitted recovery of damages, both compensatory and punitive, under Section 1983. Examples are: *Brickhouse* v. *Brooks*, 165 Fed. 534 (Cir. Ct., E.D. Va. 1908); *Sexton* v. *Gibbs*, 327 F.Supp. 134 (N.D. Texas 1970); *Washington* v. *Official Court Stenographer*, 251 F.Supp. 945 (D.C. E. Pa. 1966); *Basista* v. *Weir*, 340 F.2d 74 (3rd Cir. 1965); *Caperci* v. *Huntoon*, 394 F.2d 799 (1st Cir.), Cert. denied, 393 U.S. 940, 89 S.Ct. 299, 21 L.Ed.2d 276 (1968).

The effort by the Board to escape from damages is bottomed entirely upon a claimed immunity from civil suit damages for public officials and specifically school board directors. The petitioners contend first for an absolute immunity and in the alternative for a qualified immunity at least sufficiently broad to preclude damages in this case. They contend for the "malicious act done with intent to cause harm" test applied by the District Court in this case. *Strickland* v. *Inlow*, 348 F.Supp. 244, 250 (W.D. Ark. 1972).

The Board criticizes the decision of the Court of Appeals, which overturned the District Court's "malicious act with intent to harm" test with one of "objective good faith". Authority relied upon by the Court of Appeals for that test is *McLaughlin* v. *Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Gouge* v. *Joint School District No. 1*, 310 F.Supp. 984 (W.D. Wis. 1970); Wash. U. L. Qtly. 666 (1971); Weddle, Damages Under § 1983: The School Context, 46 Ind. L.J. 521 (1970-71.)

Support for that view is also available in: *Gautreaux* v. *The Chicago Housing Authority*, 296 F.Supp. 907 (N.D. Ill. 1969); *Bennett* v. *Gravelle*, 323 F.Supp. 203 (D. Md. 1971).

As the Board brief has pointed out, the Court of Appeals in this case has held that the test of good faith is objective, rather than subjective. We take this to mean that the claim of good faith on the part of the involved official is not alone sufficient to obtain for him a concession of good faith. His actions which are challenged must be reasonably consistent with the existence of good faith. In other words, the ancient observation that "actions speak louder than words" is singularly appropriate here. His good faith must be determined by his actions, not by his claim of good faith only.

It is, therefore, appropriate in this case that the jury have an opportunity to pass upon the good faith of these defendants under proper instructions. The instructions which were given to the jury afforded the plaintiffs no relief whatever, either injunctive, declaratory relief or damages, unless malice and a deliberate intent to injure was proved by the plaintiffs.

In this case the good faith of the defendants should be tested by a consideration of the fact that the meeting of February 18, 1972, was called to be held late in the evening, that no notice was given to the parents, that no information of any kind was given to nor required by the school board other than the recital to the Board of the information which Mrs. Powell and Mr. Waller had obtained from the three frightened little girls who were, in effect, begging for mercy, that no investigation whatever was made by the Board, that the Board requested no information as to what kind of students the girls had been, whether they had ever been involved in any other disciplinary matter, whether in fact they had succeeded in spiking the punch, what type of drink they had used, whether anyone had been intoxicated or even offended by the effort. The Board made its snap judgment without the benefit of any reliable information at all. Further, it permitted its automatic rule to become operative without ever even seeing the children involved, much less talking with them.

It is clear from a reading of the testimony that this Board apparently was almost hysterically afraid of drugs and alcohol (Appendix 69, 105 and 106). The Board apparently conceived itself to be passing sentence upon "alcoholic beverages" rather than upon children. The Board appears insensible to the tragic fact that three children were being victimized.

The "good faith" or lack of it must be measured against the events of the meeting of February 18, 1972. That meeting was moving right along toward leniency for all three of the girls until the telephone call by Mr. Curtis Powell came into the Board room and was received by Superintendent Inlow. Mr. Curtis Powell had not observed the incidents which he related (Appendix 64). Mr. Powell did tell Mr. Inlow that, according to his information, only one of the three girls was involved, and that was Jo Wahl. He did not mention either Virginia Crain or Peggy Strickland (Appendix 65).

Notwithstanding that Mr. Inlow had this information when he made his report to the School Board he withheld the information that only Jo Wahl was involved. He then sat there and observed the turnaround of the two teachers and the entire school board and never volunteered the information which he had that only Jo Wahl had been involved in that altercation, according to hearsay upon hearsay.

If lack of good faith is required, then one would be hard put to find any more striking example. The same is true of the actions of Mr. Duddy Waller and Mrs. Powell who, upon hearing the report by Mr. Inlow, vocally expressed themselves to the Board as withdrawing their recommendations as to all three girls and Mrs. Powell said, "I just washed my hands of it." Mr. Waller said "I withdraw my recommendation." (Appendix 65).

By the time the information reached the school board it was third hand; hearsay upon hearsay. Mr. Inlow had, in his report, said that one of the three girls was involved. Even though he did not say which one, he did say that one of them, not all three of them, had been involved, according to the report. Mr. Waller and Mrs. Powell did not

ask which one. They did not limit their turnabout to just one. Again, this is either bad faith or fear. These two teachers may have been so intimidated and afraid of the school board that for them to have been involved in making a recommendation for a girl who was reported to have misbehaved even while they were making the report, they might have imagined that the reaction of the school board would be against them directly. The emphatic quality of their turnabout may have been influenced by that fear. If not, it certainly was bad faith.

The minutes of the meeting of February 18, 1972, appendix 105, shows that six members of the school board were present for that meeting. Not one of those six members had enough compassion or concern for the three children to slow everyone down and ask Mr. Inlow which one of the girls was reported to have been involved. Not one of those six people suggested that perhaps the meeting could be postponed until the children and their parents could be present for a further explanation. Not one of those six members asked if anyone knew for a fact just what had been put into the punch. Not one of those six members suggested that perhaps some of the mothers of the girls who had attended the FHA meeting and drank of the punch could be asked what they knew about it and what they thought about the incident. Not one of those Board members suggested that the homeroom teachers of these girls could be asked to offer their suggestions about what would be appropriate punishment. Not one of the school board members suggested that the rule was not automatic for expulsion. Not one of the school board members suggested that mitigating circumstances could be considered.

Under the circumstances of the meeting, and considering the manner in which it was conducted and the con-

clusion that it resulted in, it was obviously called too hastily, conducted too summarily, coldly, impersonally, superficially, ineptly and brutally. If it were not bad faith, it was certainly an adequate substitute.

When these circumstances commenced to be brought to light, there were two possible courses of action for the school board. It could have compassionately and graciously admitted the hastiness of its action, agreed to an appropriate reconsideration, met again at a convenient hour and after adequate notice to all parties concerned, and taken the matter up in a reasonable, open-minded, humane, capable and effective manner.

Or, it could have closed its mind, declared its righteousness, refused all reconsideration, denied all pleas for leniency and maintained a hard line and an unyielding stand.

It took the latter course.

Every effort by the children and their parents to obtain a fair consideration met with stone-faced silence. Every effort by the District Court to reason with the Board fell on deaf ears.

If the foregoing course of conduct, as is so amply demonstrated by this record, is good faith then good faith occupies the entire panorama. There is no room left for bad faith.

CONCLUSION

The trial court very clearly was of the opinion, following the March 7, 1972, hearing, that the defendants had failed to proceed in a constitutional manner and had failed to afford due process of law to these plaintiffs. At that

point the trial judge should have granted the temporary injunction which would have restored the children to their classes, and then, with the children back in school, the court should have ordered the board to go back through the entire procedure and to do it in a constitutional manner. Instead, the court leaned over backwards to keep from ordering the school board to do what the court clearly thought they should do.

> Appendix 88: "I think the School Board ought to be big enough to face up to it and not make me have to make an order about running the schools. . . ."

Instead of ordering the school board to readmit the children pending a constitutional hearing, the trial court attempted to persuade the school board to be reasonable and to readmit the children voluntarily. The trial judge underestimated the stubbornness of the Board. While the trial judge was remonstrating with the Board members, time was passing and the opportunity to reinstate these children passed on by. Consequently, they were kept out of school for the balance of the semester and failed the year.

It can be argued forcefully that the children actually lost this case when they failed to get the temporary injunction. However, there remains the fact of the record required to be made against them by this rule, which rule states that "such suspension will be noted on the *permanent* record of the student along with reason for suspension (emphasis supplied)." The plaintiffs are entitled to an order requiring the school board to destroy that record and prohibiting them from remaking it or maintaining it in the future and from ever furnishing such a record to any interested inquirer. The court of appeals so ruled.

Further, the plaintiffs are entitled to a judicial determination of the rights of children in their circumstances

to the rudiments of due process and an adjudication that they are protected to that extent by the United States Constitution against summary expulsion without notice, without information as to what has been said before the board about them, without an opportunity to be heard and an opportunity to prepare for that hearing. It was for this relief that the plaintiffs requested a declaratory judgment.

Further, the plaintiffs could obtain and should have a decree of this court holding the Mena rule, in its present form, as invalid by reason of being discriminatory and unequal in its application to persons subject to it.

Further, the plaintiffs, having been awarded an attorney's fee in the court of appeals, the same should be approved and an additional fee allowed for their expenses in this court.

The Board argues that to permit suits of this nature against school board members will discourage qualified people from accepting positions on school boards. Perhaps it would be facetious to say that persons who discharge their duties on school boards in the same manner as it has been done in this case should be discouraged from accepting such positions. Realistically, however, respondents admit the validity of arguments that public officials should not be unnecessarily harassed by vexatious law suits. However, law suits to establish, protect and defend constitutional rights are not properly characterized as vexatious law suits. On the contrary, they are probably the most important type of litigation with which the courts deal. They involve the very fundamentals on which this country was founded; that is, the liberty of the individual.

If this particular school board had been properly cognizant of the fact that it was dealing with citizens of the

United States, and proceeded accordingly, respecting the rights of those citizens, this law suit never would have been filed. The unfortunate circumstance that gave rise to this law suit is that these children were not treated as citizens of the United States. On the contrary, the Board proceeded on the tradition prevailing in Arkansas many years ago that the adult school board members and adult school administrators were the repository of all wisdom and were infallible in their judgments and absolutely qualified to decide what was best for school children, including what sort of information they would consider sufficient for action, and what action would be taken. In the paternalistic attitude of the past, which was mentioned by Judge Williams in his statements to the Board (Appendix 80), the school boards and school administrators summarily punished children, including suspending and expelling them, without any thought of giving them any due process of law at all, and did it in good faith.

In the days of the one room school, the schoolmaster was witness, judge, jury and executioner, but he knew his pupils intimately and was with them constantly. In today's large schools disciplinary procedures must be more formal to assure that discipline accomplishes justice rather than injustice.

If school boards and administrators are given immunity so that they can, with impunity, violate the constitutional rights of the children attending public school so long as they do it in good faith, then a premium is placed on ignorance and stupidity and the constitutional rights of the students are abrogated. We will have the anomaly of the availability of constitutional redress for the children depending upon the degree of ignorance enjoyed by the particular school administrators and school boards of their particular district.

The plaintiffs respectfully submit that the ruling of the Court of Appeals was correct insofar as it granted the relief prayed for by plaintiffs and should be affirmed and that the case should be sent back to the District Court for the entry of an order consistent with the decision of the Court of Appeals and for a jury trial on the issue of damages.

Respondents respectfully pray that an additional attorney's fee be allowed in this court and that they have judgment for all of their costs.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1285

JOHN P. WOOD, et al.,
Petitioners,

vs.

PEGGY STRICKLAND, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Brief Amicus Curiae of the Childhood and Government Project in Support of Respondent Children

We present this brief in support of Respondent children with the consent of the parties pursuant to Supreme Court Rule 42. Copies of letters of consent are filed herewith.

INTEREST OF AMICUS CURIAE

The Childhood and Government Project of the Earl Warren Legal Institute, The School of Law, University of California, Berkeley, California, was established in 1972. It is funded by the Ford Foundation and the Carnegie Corpora-

tion of New York. The Project is concerned with all phases of governmental policy and action which directly affect the lives of children, particularly in the context of elementary and secondary schooling. This case is of special interest to the Project because it raises significant constitutional issues regarding the kinds of procedural constraints which public school officials must observe before the opportunity to receive an education can be withdrawn from a child. At stake here and of particular concern to Amicus is the question whether an interest as basic as the opportunity to attend school can be withdrawn for a substantial period of time, in the absence of emergency circumstances, without due process of law.

INTRODUCTION AND STATEMENT OF THE CASE

The most far-reaching issue presented by this case and briefed by the parties in this Court is an issue which neither court below decided: whether public school suspension and expulsion procedures must comply with Fourteenth Amendment due process standards. Amicus is particularly concerned, therefore, that this Court—in the process of affirming the indisputably broad discretionary power of school officials to discipline students free from excessive interference by the federal judiciary—not use a case such as this, in which the core issue has been so tangentially presented, as a vehicle for dramatically constricting the place of due process in the school suspension and expulsion context.

The questions presented in the petition for certiorari could be construed to exclude this basic issue, and to include only the issue of whether the Court of Appeals was correct in its conclusions (1) that there was no evidence to support the Respondents' expulsion; (2) that such absence of evi-

dence constituted a basis for action under Title 42 U.S.C. Section 1983; and (3) that school officials might be held liable for damages under Section 1983 without a showing of malice.

This Court might, however, choose to reach the central issue of fundamental fairness in school suspensions and expulsions, because Petitioners broadly argue that due process does not apply at all in school suspension cases (Petitioners' Brief, p. 15). The procedural due process issue may accordingly be subsumed within Petitioners' first question. (See Supreme Court Rule 23). Moreover, Respondents, although not cross-petitioning, have sought to present procedural arguments to justify the result below. (Response to Petition, pp. 5, 19, 20, 26). Under similar circumstances, this Court has previously held that questions such as the procedural due process issue in this case can be reached and decided. See *Langnes v. Green,* 282 U.S. 531 (1931); *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 560 (1931); *Boynton v. Virginia,* 364 U.S. 454, 457 (1960).

Amicus submits this brief to rebut Petitioners' claim that due process has no place in school suspensions and to indicate the constructive role that can be played by due process in cases where severe penalties, such as lengthy suspensions and expulsion, are being assessed against specific individuals. This brief does not address the narrower question whether the Court of Appeals exceeded its proper role in determining on the facts of this case that the School Board had misapplied its own regulation prohibiting the use of "intoxicating" beverages.

This case arises out of the lengthy suspension of Respondents and one other girl from high school for allegedly "spiking" the punch at a school function on February 7,

1972.[1] The suspensions "for the balance of the semester" had, as found by the Court of Appeals, the practical effect of causing the girls to fail their entire sophomore year. (Petition for Cert., Appendix, p. 3, n. 1).

On February 18, 1972, the girls were taken to the principal, who suspended them from school on the spot for one week[2] and indicated that the matter would at some point be referred to the School Board for further action. (Appendix, p. 26). After talking to the girls, the principal arranged for a meeting of the School Board to be held the same evening to consider the matter. No notice of the Board meeting was given either to the girls or to their parents.[3] (Appendix, p. 54). Neither the girls nor their parents were present at the February 18 meeting. Acting in their absence, the Board that evening suspended the girls for the balance of the term. (Appendix, p. 105).

Notice of the action already taken was given to Respondents and their parents on February 19. On February 24

1. On February 17, 1972, on urging from their home economics teacher, Mrs. Powell, the three girls told what they had done. The Court of Appeals described the incident:

> "[O]n the day of the spiking incident, someone (it is not clear who) suggested that the punch be spiked. The three girls obtained permission to leave the campus and traveled to a tavern in Oklahoma where Jo Wall, not a party to this action, purchased two 12-ounce bottles of a flavored malt beverage, "Right Time." The three students then purchased six 10-ounce containers of soft drink and combined the total eighty-four ounces of liquid in a milk carton, and returned with the mixture to school. To the liquid was then added enough water to total one and one-half gallons of punch, which was served at the gathering." (Petition for Cert. Appendix p. 2)

2. The principal acted on the mistaken belief—conveyed to him by one of the girls—that the alcoholic content of Right Time was 20%. (Appendix, p. 52). In point of fact, the alcoholic content, according to the manufacturer, was 3.2% or less. (Appendix, p. 94).

3. Curiously, while no notice was given to the parties directly affected, notice was given to the press. (Appendix, p. 55).

the parents were notified that they could appear before the next regular meeting of the Board, scheduled for March 14, in order to petition for reinstatement of their daughters. (Appendix, pp. 137-138). The parents were then informed, on February 29, that there would be a special meeting of the Board on March 2, 1972, and that they could appear with counsel at that meeting. (Appendix, p. 138).

At the March 2 meeting, the Board refused to alter the action previously taken by it on February 18.

On March 6, 1972, the instant action was filed by Respondents in the Federal District Court, Western District of Arkansas, alleging a claim under Title 42 U.S.C. Section 1983, and seeking a declaratory judgment, injunctive and such other relief as would be appropriate. (Appendix, p. 6). On March 7, 1972, after a hearing, the trial court entered an order denying Respondents' motion for preliminary injunction. (Appendix, p. 84). While expressing considerable concern about the fairness of the procedure and the severity of the punishment, the trial court held that it was without jurisdiction to review the action of the School Board. The trial court entered no formal findings as to the adequacy of either the February 18 or March 2 School Board actions. (Appendix, pp. 78-84).

On March 14, 1972, Respondents amended their complaint, adding a claim for damages under Section 1983. (Appendix, p. 91).

On July 21, 1972, the trial court entered an order denying Petitioners' (Defendants') motion for partial summary judgment and set the case for trial before a jury. Trial was held on August 17, 18, 19 and 21, 1972. The jury was unable to reach a verdict, and a mistrial was declared.

On September 29, 1972, the trial court entered an order on renewed motion of Petitioners for judgment. The court

found that malice had not been shown, and held that Respondents (Plaintiffs) therefore could not sustain an action for damages under Section 1983. Again, the District Court made no findings regarding the procedural sufficiency of the School Board actions of February 18 and March 2. (The opinion of the District Court is incorporated in the Petition for Cert., Appendix, pp. 15-34).

The Court of Appeals reversed, on the basis that what it called "substantive due process" had been violated at both the February 18 and March 2 meetings of the School Board. In passing, the Court of Appeals also found the February 18 meeting procedurally deficient. Because of its construction of the case, the court refused to determine whether the March 2 meeting could have cured the deficiencies in the February 18 meeting. Thus the case reaches this Court with no determination, by either federal tribunal below, whether the Respondents were denied procedural due process by the manner of their suspensions.

SUMMARY OF ARGUMENT

In Section I, we argue that Respondents' interest in continuing their education at a public high school is the kind of "liberty" and "property" interest protected under the Due Process Clause. Expulsion from the public school is a grievous injury to Respondents, interfering greatly with their life prospects, injuring their reputations in the community, and depriving them of opportunities to which state law itself entitles them. The public school systems of this nation clearly are not enclaves of totalitarianism beyond the reach of the Fourteenth Amendment, and thus school officials must provide a fair hearing to students when the expulsion sanction is employed. In Section II, we outline the minimum safeguards we believe due process requires in

school discipline cases. Finally, in Section III, we seek to show that the February 18 proceeding at which Respondents were suspended did not comply with due process requirements and that the March 2 meeting of the Board cannot be said, on this record, to have cured this defect. Accordingly, we urge this Court to remand for further proceedings.

ARGUMENT

I. The Due Process Clause Applies to the Respondents' Expulsion from Public High School.

A. INTRODUCTION.

More than fifteen years ago, Professor Warren A. Seavey of the Harvard Law School wrote a short article expressing outrage at the lack of procedural safeguards for students expelled or suspended from public schools and colleges. He noted that the harm to a student stemming from exclusion was great: the student would have no opportunity to prove his innocence, the stigma of the alleged wrong would follow the student well beyond the school setting, and, most importantly, the student's ability to obtain future employment would be severely curtailed. While the infraction might be trivial, the punishment certainly was not. He expressed disbelief that the courts could be moved to extend procedural due process guarantees in so many areas, while ignoring the plight of the student entirely at the mercy of public school authorities:

> At this time when many are worried about dismissal from public service, when only because of the over-

> riding need to protect the public safety is the identity of informers kept secret, when we proudly contrast the full hearings before our courts with those in the benighted countries which have no due process protection, when many of our courts are so careful in the protection of those charged with crimes that they will not permit the use of evidence illegally obtained, *our sense of justice should be outraged by denial to students of the normal safeguards. It is shocking that the officials of a state education institution, which can function properly only if our freedoms are preserved, should not observe the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket.*

W. Seavey, "Dismissal of Students: 'Due Process,'" 70 Harv.L.Rev. 1406, 1407 (1957) (Emphasis added).

Since Professor Seavey wrote his landmark article, the federal courts have moved forcefully in the direction of affording procedural due process rights to students attending public educational institutions. The path-breaking case was *Dixon v. Alabama Board of Education*, 294 F.2d 150 (5th Cir. 1961), in which Judge Rives, writing for a unanimous court, rejected the old clichés and formalisms which, for so long, had denied students their due process rights. The question was not whether students had a right to attend public schools or only a privilege to do so, nor was the question the extent to which parents had delegated their parental responsibilities to school authorities:

> It is not enough to say, as did the district court in the present case, "The right to attend a public college or university is not in and of itself a constitutional right." . . . That argument was emphatically answered by the Supreme Court in [*Cafeteria and Restaurant Workers*

> *Union v. McElroy*, 367 U.S. 886, 894 (1961)]. . . . "One may not have a constitutional right to go to Bagdad, but the government may not prohibit one from going there unless by means consonant with due process of law."
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> . . .
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> The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning. . . . It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society . . . [P]laintiffs [were] . . . . injured by the interruption of their course . . . in midterm. *Dixon v. Alabama, supra,* at 156-157.

The *Dixon* decision, emanating from a single circuit, quickly became the law of the land. See generally W. Buss, "Procedural Due Process for School Discipline: Probing the Constitutional Outline," 119 U.Pa.L.Rev. 545 (1971); C. Wright, "The Constitution on the Campus," 22 Vand.L. Rev. 1027 (1969). Due process rights were extended to students in public elementary and secondary schools by all eleven circuit courts of appeal. See, e.g., *Williams v. Dade County School Board*, 441 F.2d 299 (5th Cir. 1971); *Linwood v. Board of Education*, 463 F.2d 763 (7th Cir. 1972); *Wasson v. Trowbridge*, 382 F.2d 807 (2nd Cir. 1967); *Tate v. Board of Education*, 453 F.2d 975 (8th Cir. 1972). Many state courts reached the same conclusion. See, e.g., *R.R. v. Board of Education*, 109 N.J. Super. 337, 263 A.2d 180 (1970); *Charles S. v. Board of Education*, 20 Cal. 3d 83, 97 Cal.Rptr. 422 (1971). Although the principles announced in non-school cases by this Court amply support the actions of these state and federal courts,[4] their unanimity is all

4. See, e.g. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Greene v. McElroy*, 360 U.S. 474 (1959); *Slochower v. Board of Education*, 350 U.S. 551 (1956).

the more striking in view of the absence of an explicit Supreme Court ruling in a school expulsion case.

Despite this history, Petitioners argue that due process guarantees are inapplicable to public high school students. They ask for the repudiation of a principle which has been found workable, fair, and not unduly restrictive of the rightful discretion of public school officials in student discipline matters; and the substitution of a principle grounded on their unsubstantiated fears. If the observance of due process procedures in the public schools is the first step toward chaos, "the second step has been long in coming." *Walz v. Tax Comm'r.*, 397 U.S. 664, 669 (1970). Thus, Petitioners ask this Court to wipe out, with one bold stroke, the progress of nearly fifteen years. They would subject students to the unfettered authority of school officials to do grave injury to their life prospects without any opportunity to refute the charges made against them. To ask the Court to take this step in an expulsion case, involving a complete denial of all educational opportunities for a substantial time, is all the more astounding.

The interest involved in a public school expulsion decision is precisely the sort of interest that the Due Process Clause has historically protected. As Mr. Justice Frankfurter stated, the Court has long recognized "the right to be heard before being condemned to suffer grievous loss of any kind even though it may not involve the stigma and hardships of a criminal conviction." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Mr. Justice Frankfurter, concurring). Respondents suffered grievous harm in this case, being deprived of all educational opportunity for a substantial period of time. They had no choice but to suffer this deprivation in light of the heavy financial burden of securing a private education. See *Griswold v. Connecticut*, 381 U.S. 479, 525 (1965) (Mr. Justice White, concurring). In addition, their asserted infraction is now a part of their permanent record, and thus is likely to have a continuing impact on their life prospects. Thus, their expulsion certainly has a stigmatizing effect on them, reducing their standing with peers, teachers, and administrators, and ultimately their ability to secure a higher education and gainful employment.

These harms are all the more striking in the absence of a fair hearing. The particularized standards for expulsion under Arkansas law and the school's rules are meaningless absent a hearing in which Respondents have the opportunity to present their side of the case. They must be able to attempt to refute the charge that the rules may be appropriately applied to punish them for their personal actions. In this regard, individualized proceedings are absolutely essential to the illumination of facts bearing on their alleged misconduct. Otherwise, there is every reason to doubt the accuracy of the School Board's final determinations. Moreover, the legitimacy of the exercise of power by school authorities is seriously open to question when they refuse to abide by standards of fairness. Mr. Justice Frankfurter has stated these underpinnings of procedural due process with characteristic eloquence:

> Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and op-

> portunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Joint Anti-Fascist Refuge Comm. v. McGrath, supra, at 171 (Mr. Justice Frankfurter, concurring).

B. RESPONDENTS WERE DEPRIVED OF AN INTEREST IN LIBERTY AND PROPERTY WHEN THEY WERE EXPELLED FROM PUBLIC HIGH SCHOOL.

The Due Process Clause of the Fourteenth Amendment does not, of course, apply to all conceivable deprivations suffered by an individual at the hands of the state. To determine whether a particular deprivation is within the scope of the Due Process Clause, the Court has asked "whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). The interests protected by the Due Process Clause are not limited to real estate or chattels or to a deprivation of physical liberty pursuant to the criminal process. *Board of Regents v. Roth,* 408 U.S. 564, 572 (1972). See also *Bell v. Burson,* 402 U.S. 535 (1971); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Meyer v. Nebraska,* 262 U.S. 390 (1923). Nor is the "wooden distinction" between "rights" and "privileges" determinative of a due process inquiry. *Board of Regents v. Roth, supra,* at 571. See also *Arnett v. Kennedy,* 94 S.Ct. 1633, 1650 (1974) (Mr. Justice Powell, concurring in part); *Graham v. Richardson,* 403 U.S. 365, 374 (1971) (Opinion of Mr. Justice Blackmun); *Goldberg v. Kelly,* 397 U.S. 254 (1970).

1. Respondents have been deprived of an interest in liberty.

The notion of liberty embodied in the Due Process Clause has never been given any precise or limited definition by this Court. This is altogether appropriate, since "in a constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents v. Roth, supra,* at 572. The framers did not lightly assume that what was not expressly forbidden to government was a proper subject for unlimited government intervention; for much of the private role of the individual, assumed by all as "essential to the orderly pursuit of happiness by free men," would then be overwhelmed by governmental decision-making. *Meyer v. Nebraska, supra,* at 399. However, to guarantee such liberty absolutely would be to force the constitution into an undue restraint upon the operations of the government. The brilliant answer to this dilemma, embodied in the Due Process Clauses of the 5th and 14th Amendments, was that the private liberties of the people could be curtailed only where the state observed stringent standards of fairness. As Mr. Justice Marshall has put the matter:

> One aspect of fundamental fairness, guaranteed by the Due Process Clause of the Fifth Amendment, is that individuals similarly situated must receive the same treatment by the Government . . . It is a corollary of this requirement that, in order to determine whether persons are indeed similarly situated, "such procedural protections as the particular situation demands" must be provided. *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972).

U.S. Department of Agriculture v. Murry, 413 U.S. 508, 517 (1973) (Mr. Justice Marshall, concurring). If adequate hearing procedures were observed, if a fair and even-handed application of the law were required, then, by definition, government would not lightly interfere with the liberties of the people.

Against this basic philosophical background, the Court has described an interest as falling within the concept of

"liberty" under the Due Process Clause in circumstances involving no physical restraint: when the government interferes with the well-established prerogative of an individual to relate to other private parties, particularly in the family context, or to develop his personality and intellect (*Board of Regents v. Roth, supra,* at 572; *Meyer v. Nebraska, supra,* at 399; *Stanley v. Illinois,* 405 U.S. 645 (1972)); and when the government acts against the individual in such a fashion that his "good name, reputation, honor or integrity is at stake," *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971). See aso *Arnett v. Kennedy, supra,* at 1647, 1648 (Plurality opinion of Mr. Justice Rehnquist); *Board of Regents v. Roth, supra,* at 573. In the second group of cases, it is not so much the particular denial which leads to the characterization of the interest as a liberty—for example, the loss of public employment; rather, the manner in which the denial takes place is deemed to be critical. The denial may so stigmatize and injure the reputation of a citizen that it greatly and adversely affects his ability in the future to conduct his personal affairs, that is, to interact with private and public parties for his benefit. *Board of Regents v. Roth, supra,* at 574; *Arnett v. Kennedy, supra,* at 1646 (Plurality opinion of Mr. Justice Rehnquist); *Joint Anti-Fascist Refugee Comm. v. McGrath, supra,* at 185 (Mr. Justice Jackson, concurring). In this sense, the two lines of cases merge to protect one broad interest of the individual in liberty.

When this Court has provided illustrations of protected liberty interests, it has inevitably included the opportunity of an individual "to contract, to engage in any of the common occupations of life, *to acquire useful knowledge*, to marry, establish a home and bring up children." *Meyer v. Nebraska, supra,* at 399 (Emphasis added). See also

Board of Regents v. Roth, supra, at 572. The opportunity to remain in public school obviously is encompassed by these interests. Is not education the key to an individual's employment opportunities? Is not public schooling the most common way of acquiring useful knowledge? Is not public schooling, at least in the twentieth century, an integral part of the raising of children? Indeed, on a number of occasions, this Court has gone even further. In *Pierce v. Society of Sisters, supra,* the Court held that the state could not lightly interfere with the ability of parents to send their children to private schools, let alone their opportunity to send their children to the schools established by the community for public benefit. Where the state has chosen to establish a public school system, should not the opportunity to attend a public school be afforded a similar status? Indeed, in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 25 n. 60 (1973), Mr. Justice Powell, writing for the majority, intimated that if a child were "absolutely precluded from receiving an education," a more compelling case for judicial intervention would be posed than was presented by the merely relative financial disparities demonstrated in that case. If complete exclusion, as here, may give rise to substantive constitutional concerns under the Equal Protection Clause, the case is even more persuasive for affording minimal due process guarantees so that the individuals injured may challenge the evidentiary basis for their expulsion, and participate in the decisions that so intimately affect their lives. Cf. *Board of Regents v. Roth, supra,* at 575 n. 14.

If the question is approached from the perspective of stigmatization and injury to reputation, the characterization of Respondents' interest as liberty within the scope of the Due Process Clause is even clearer. Even where govern-

ment's power over a particular matter is virtually plenary, if the basis of the government's decision is such that it "might seriously damage his standing and the associations in his community," notice and an opportunity to be heard are required. *Board of Regents v. Roth, supra,* at 573. Compare *Wisconsin v. Constantineau, supra,* at 437 with *California v. LaRue,* 409 U.S. 109 (1972). The operative concept is one of grievous injury beyond that which would normally occur as a result of the government's decision.

Respondents are obviously stigmatized and injured in a number of ways by virtue of their exclusion for violating the school rule prohibiting intoxicating beverages. The interruption of their schooling has a dramatic impact on their grades and their ability to complete their education. Here Respondents, in effect, failed their sophomore year of high school. Their alleged infraction becomes a part of their permanent record, thereby influencing adversely their prospects of securing admission to institutions of higher learning or obtaining a decent job. Moreover, and most importantly, these children have been labeled as deviant and their activities as unlawful. In violation of the spirit if not the letter of state law, they are accused as minors of illegally obtaining an alcoholic beverage and making it available to still other minors. Teachers, parents, and their peers may treat them as rebellious, as unable to abide by reasonable standards imposed by society. Such expectations, accompanied by lower self-esteem, may well become self-fulfilling prophecies. In short, whatever the general power of state authorities to exclude students from the public schools, the manner of exclusion in this case, dramatically injuring Respondents' life prospects and their standing in the community, requires the observance of the basic guarantees of procedural due process.

2. Respondents have been deprived of an interest in property.

In *Board of Regents v. Roth, supra,* and *Perry v. Sindermann,* 408 U.S. 593 (1972), Mr. Justice Stewart, writing for the Court, established the currently applicable framework for analyzing whether a particular interest fell within the concept of "property" under the Due Process Clause:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, indeed, have a legitimate claim of entitlement to it . . . Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, supra, at 577. See also *Arnett v. Kennedy, supra,* at 1650 (Mr. Justice Powell, concurring in part). The question then is whether the state so acted (by statute, rule, understanding, guideline or contract) as to give rise to a justifiable expectation of continued enjoyment of the state-provided benefit. See, e.g. *Goldberg v. Kelly, supra; Arnett v. Kennedy, supra,* at 1650 (Mr. Justice Powell, concurring in part); *Perry v. Sindermann, supra; Wieman v. Updegraff,* 344 U.S. 183 (1952). A unilateral expectation, a mere hope which is not based upon any act of the state, will not suffice. *Board of Regents v. Roth, supra.*

While Petitioners would have it that Respondents' expectation of continued public schooling is based upon noth-

ing more than their active imaginations, those expectations are in fact rooted solidly in and arise from the positive law of the State of Arkansas. The Arkansas Constitution provides that:

> Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education.

Art. 14, Sec. 1, Arkansas Constitution (1973). The state has thus undertaken an obligation to provide free public schools to its people. This provision, as implemented by the state when it established a system of public elementary and secondary education, and as reinforced when it made public education mandatory, secures for the children of Arkansas an entitlement to the benefits of public schooling and a legally sanctioned expectation of the continuation of their education in the absence of some particular justification for its termination.

Article 14 is further reinforced by a number of specific statutory enactments. Section 80-1501, Ark. Stat. Ann. (1973), for example, specifically states that *"the public school district shall be open and free to all persons between the ages of six and twenty-one years, residing in that district . . . . ."* (Emphasis added). Further, Section 80-1502, Ark. Stat. Ann. (1973), requires parents of children between the ages of seven and fifteen to send their children to public or private school under penalty of fine or prosecution. And Section 80-1516, Ark. Stat. Ann. (1973), restricts both the grounds for suspension from public schooling and the length of the suspension:

> The directors of any school district may suspend any person from school for immorality, refractory conduct, insubordination, infectious disease, habitual uncleanliness or other conduct that would tend to impede the discipline of the school, or harm the other pupils, but such suspension shall not extend beyond the current term. The board of directors may authorize the teacher to suspend any pupil, subject to appeal to the board.

The thrust of these statutory provisions is that Arkansas at every turn affirms the expectation that Respondents will remain in the public school system until the twelfth grade so long as they do not engage in certain specified forms of misconduct. Indeed, the failure to attend the public schools gives rise to sanctions against the parents of the truant children. Thus, this case presents an even clearer case for finding a property entitlement than does the Court's decision in *Arnett v. Kennedy, supra,* in which six Justices held that a federal statute guaranteeing continued employment absent "cause" for discharge creates a sufficient property interest for due process purposes despite the statute's explicit provision that no hearing need be held. *Id.,* at 1650 (Mr. Justice Powell, joined by Mr. Justice Blackmun, concurring in part), at 1660 (Mr. Justice White, concurring in part and dissenting in part), at 1669 (Mr. Justice Douglas, dissenting), at 1673 (Mr. Justice Marshall, joined by Mr. Justice Douglas and Mr. Justice Brennan, dissenting).

Finally, it should be noted that Arkansas law does not specify any particular procedures which are required, or any which are to be foregone, when a student is alleged to have engaged in conduct forbidden by Section 80-1516, Ark. Stat. Ann. (1973). Thus this case is clearly more compelling than *Arnett v. Kennedy, supra.* For as Mr. Justice Rehnquist noted in *Arnett,*

> [T]he very section of the statute which granted [the Appellee] that right [to continuing employment except for cause] . . . expressly provided also for the procedure by which "cause" was to be determined, and expressly omitted the procedural guarantees which Appellee insists are mandated by the Constitution. Only by bifurcating the very sentence of the Act of Congress which conferred upon Appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it.

Id., at 1643 (plurality opinion of Mr. Justice Rehnquist). Compare *id.* at 1642 (Mr. Justice Powell, concurring). Respondents' justifiable expectations here were in no way diminished, as they at least arguably had been in *Arnett*, by the specification of procedures for suspension. Rather, the state statute addressed itself only to the substantive ground for suspension, a matter not here in dispute.

3. Petitioners Misconstrue San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

Petitioners place great emphasis on *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). They argue, in effect, that *Rodriguez* completely insulates the actions of public school administrators from judicial review. That interpretation is plainly incorrect. See, e.g., *Lau v. Nichols*, 414 U.S. 563 (1974); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Papish v. Board of Curators of Univ. of Mo.*, 410 U.S. 667 (1973); *Healy v. James*, 408 U.S. 169 (1972); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). From a narrower, though equally indefensible, perspective, Petitioners argue that this Court's determination in *Rodriguez* that education is not a fundamental interest for equal protection purposes is also conclusive with respect to its characterization as a liberty or property interest under the Due Process Clause. The premise of this argument is misleading; for this Court has never indicated that a complete denial of all educational opportunities, as in this case, would fail to give rise to a valid equal protection claim. The Court in *Rodriguez* simply held that relative inequalities in the distribution of a public resource, absent discrimination against a suspect class, should be tested by the traditional rational basis standard under the Fourteenth Amendment. See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970); *Richardson v. Belcher*, 404 U.S. 78 (1971); *Jefferson v. Hackney*, 406 U.S. 535 (1972). See L. Tribe, "The Supreme Court, 1972 Term, Foreword: Toward a Model of Roles in the Due Process of Life and Law," 87 Harv.L.Rev. 1, 43-44 (1973). But more important, the adoption by this Court of Petitioners' argument would require the overruling of *Board of Regents v. Roth, supra*, and a long line of procedural due process decisions by this Court. See, e.g., *Mitchell v. W. T. Grant*, 42 U.S.L.W. 4671 (1974); *Goldberg v. Kelly, supra; Sniadach v. Family Finance Corp., supra; Slochower v. Board of Education, supra; Connell v. Higgenbotham*, 403 U.S. 207 (1971); *Bell v. Burson, supra.*

To begin with, this Court has never held that there must be a substantive constitutional entitlement to a particular benefit under the Constitution before the guarantees of procedural due process attach. In *Perry v. Sindermann, supra*, for example, Professor Sindermann never asserted, nor would the Court have perceived that he had, a right secured by the federal Constitution to teach at the Odessa Junior College. Nonetheless, this Court held that, if Sindermann could show the requisite property interest (by demon-

strating a reasonable expectancy of continued employment under an implied contract with the state), he would be entitled to due process procedures before nonrenewal of his contract. *Id.* at 603. See also *Slochower v. Board of Education, supra; Wieman v. Updegraff, supra.* Similarly, in *Goldberg v. Kelly, supra,* the Court never held that the plaintiffs were entitled to welfare benefits as a matter of federal constitutional law. See also *Dandridge v. Williams, supra.* Nonetheless, the state was required to afford a due process hearing prior to the termination of those benefits. *Id.,* at 264. The point is amply and poetically made by the often quoted language from *Cafeteria and Restaurant Workers Union v. McElroy, supra,* at 886: "One may not have a constitutional right to go to Bagdad, but the government may not prohibit one from going there unless by means consonant with due process of law."

Thus, whether the denial of all educational opportunities by the state would constitute a substantive deprivation of a constitutional right is irrelevant to the question of whether or not due process procedures must accompany that deprivation. As Section IB, subsections 1 and 2, *supra,* demonstrated, Respondents' interest in continuing their education can be and should be characterized as both a liberty and property interest. These students are entitled, therefore, to notice and a fair hearing whatever the status of their substantive claim.

The other fatal flaw in Petitioners' argument is a disregard for the nature of the property interests encompassed by the Due Process Clause. Property interests are created by state law or by other enactments and actions of state officials. Such interests are not creatures of the federal Constitution:

> [The] point is that the relationship between a state institution and one of its teachers is essentially a matter of state concern and state law. The Court holds today only that a state-employed teacher who has an implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause for nonrenewal of his contract. *Thus* [*the issue*] *hinges on a question of state law.* The Court's opinion makes this point very sharply: *"Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." Board of Regents v. Roth, supra,* at 577. (Emphasis added)

Perry v. Sindermann, supra, at 604 (Mr. Chief Justice Burger, concurring) (Emphasis added). To be sure, once the state creates a property interest, the scope of the due process guarantees to be afforded the injured party is a matter of federal constitutional law. See *Arnett v. Kennedy, supra* (Mr. Justice Powell, concurring in part). But it is the state that defines the underlying interest in the first instance. In this case, therefore, the question is not whether education is a substantive entitlement under federal law, but *whether there is some entitlement to education, or at least a justified expectancy of continued education, under Arkansas law.* Since the latter question must be answered in the affirmative (see part IB2, *supra*), the status of education as a nonprotected interest under an equal protection challenge to inequalities in its distribution is irrelevant for the purpose of applying the Due Process Clause to a complete deprivation of educational opportunity.

C. THE PUBLIC SCHOOLS ARE NOT "ENCLAVES" BEYOND THE REACH OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The thrust of Petitioners' brief is that public schools present such a specialized environment that due process rights have no application to decisions of school authorities. Petitioners' Brief, p. 14.) Even if Respondents' interest in remaining in the public schools can be aptly characterized as a liberty or property interest, they assert that institutional concerns render inappropriate the application of due process restraints on governmental decision-making. To the extent that Petitioners mean to assert that the form and timing of the required hearing must be determined by a weighing of the interest of the individual in fairness against the state's interest in efficiency, we have no difficulty with their position. The requirements of due process are flexible and may be varied as circumstances compel. See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath, supra,* at 168. (Mr. Justice Frankfurter, concurring); *Cafeteria and Restaurant Workers Union v. McElroy, supra,* at 895; *Hannah v. Larche,* 363 U.S. 420, 440, 442 (1960). Recent decisions of this Court affirm this position. See, e.g., *Arnett v. Kennedy, supra,* at 1652 (Mr. Justice White, concurring in part and dissenting in part); *Calero-Toledo v. Pearson Yacht Leasing Co.,* 42 U.S.L.W. 4693 (1974); *Wolff v. McDonnell,* 42 U.S.L.W. 5190 (1974); *Mitchell v. W. T. Grant, supra.* But to the extent that their argument is to be taken at face value, as an argument that the Court should weigh the competing interests on the threshold question of the applicability of the Due Process Clause, it must be categorically rejected:

> ". . . a weighing process has long been a part of any determination of the *form* of hearing required in a particular situation by procedural due process. But to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake . . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth, supra,* at 570, 571.

The public schools are not enclaves of totalitarianism wholly beyond the reach of the Fourteenth Amendment. Cf. *Tinker v. Des Moines Independent Community School Dist., supra.* This Court addressed itself to the "enclave" theory in a number of military and prison cases decided last term. See, e.g., *Parker v. Levy,* 42 U.S.L.W. 4979 (1974) (military); *Pell v. Procunier,* 42 U.S.L.W. 5006 (1974) (prisons); *Wolff v. McDonnell, supra,* (prisons). In not a single instance did any Justice reject the application of due proces standards in the area under consideration. In *Parker v. Levy, supra,* both the majority and the dissent applied the doctrines of vagueness and overbreadth to the Code of Military Justice. What divided the Justices was the scope of those doctrines and the nature of their application in a military setting, not the more fundamental issue of applicability. Similarly, in *Wolff v. McDonnell, supra,* Mr. Justice White, writing for the majority, made it quite clear that due process rights are available to prison inmates:

> The State of Nebraska asserts that the procedure for disciplining prison inmates for serious misconduct is a matter of policy raising no constitutional issue. If the position implies that prisoners in state institutions are wholly without protections of the Constitution and the Due Process Clause, it is plainly untenable. Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen . . . . But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. *There is no iron*

> *curtain drawn between the Constitution and the prisons of this country . . . . The prisoner may . . . claim the protections of the Due Process Clause. He may not be deprived of his life, liberty or property without due process of law.*

Id. at 5195. (Emphasis added). The only question in the case was how to reach an "accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application," *id.* at 5196, and it was only here that the majority and the dissent disagreed.

If the Due Process Clause applies to prison inmates and members of the armed forces, it is preposterous to assert that it has no application to the nation's public school students. The military is a "specialized society separate from civilian society." *Parker v. Levy, supra,* at 4982. It is a tightly organized society, designed to fight and be ready to fight wars, and dedicated to the survival of the nation. "Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." *Orloff v. Willoughby,* 345 U.S. 83, 94 (1953). So too, the prison inmate, by the very nature of incarceration for a crime, must be limited in his assertion of rights and privileges under the Constitution. As Mr. Justice Stewart stated in *Pell v. Procunier, supra:*

> An important function of the corrections system is the deterrence of crime. . . . [Incarceration] . . . also serves a protective function by quarantining criminal offenders for a given period of time while, it is hoped, the rehabilitative processes of the corrections system work to correct the offender's demonstrated criminal proclivity. . . . Finally, central to all other corrections goals is the intitutional consideration of internal security within the corrections facilities themselves.

Id. at 4999. The very statement of the distinguishing features of military and prison life underscores the inappropriateness of applying standards derived from those settings to public schooling.

That the children of Arkansas are required to attend public schools in no way intimates that they are to be treated as prison inmates. They are not violators of the criminal law, they are not being "rehabilitated," and it is hyperbolic and inaccurate to suggest that school discipline problems approach those of penal institutions. Nor is military life a close parallel. To be sure, public school students have an obligation, not at issue here, to obey teachers and administrators, but the hardened discipline of military life, necessitated by considerations of national defense, does not have any counterpart in the modern public school. In short, the institutional role of the public schools is to educate our children to the skills and values necessary for economic well-being and participation in democratic government. While discipline plays its role, the overriding aims are to communicate information, provoke discussion and analysis, and promote the intellectual growth of the students. The restrictions on individuals necessitated by such goals, even in a compulsory setting, are significantly less far-reaching than in the military or penal institutions.

The role of the public schools in socializing children to American political values has always been recognized by citizens and educators (see generally G. Counts, *The American Road to Culture* (1930)) and has never been seriously challenged by this Court. As Mr. Justice Jackson stated in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1923), "The State may 'require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guarantees of civil liberty, which tend to inspire patriot-

ism and love of country.'" *Id.* at 63, quoting from *Minersville School District v. Gobitis*, 310 U.S. 586, 604 (1940) (Mr. Chief Justice Stone, dissenting). See also *Abington School District v. Schempp*, 374 U.S. 203, 230 (1963) (Mr. Justice Brennan, concurring); *Pierce v. Society of Sisters, supra; Meyer v. Nebraska, supra*, cf. *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245 (1934). But schools do not communicate exclusively through the planned curriculum. See generally D. Kirp and M. Yudof, *Educational Policy and the Law*, pp. 126-132 (1974). If children are to learn the American democratic ethic, the actions of school authorities must be consistent with that ethic. See W. Brennan, "Comment: Education and the Bill of Rights," 113 U.Pa.L. Rev. 219, 225 (1964). The schools cannot teach respect for the Bill of Rights and the requirements of due process if they flout it in their every action with respect to the welfare of their students. Thus, adherence to due process standards in the public schools, far from being inconsistent with institutional goals, is vital to their accomplishment. If anything, the public school system should be an "enclave" in which constitutional imperatives are more closely observed than in the society at large.

II. In Cases of Lengthy School Suspensions Due Process Requires Notice and a Meaningful and Timely Opportunity to Be Heard.

We have argued above that that Due Process Clause should apply to school expulsion cases, entitling Respondents to procedural protection. School children are neither convicted criminals in penal institutions nor members of the armed forces bound by the military tradition of obedience and discipline. But whatever the validity of these distinctions, it is clear beyond any doubt that the nation's school children must be afforded, at a minimum, the same procedural rights available to prisoners and servicemen. To do less would be to declare that the public schools are indeed enclaves of arbitrariness, enclaves beyond the reach of the Constitution, and that convicted criminals are entitled to a procedural fairness unavailable to our children.

The minimum requirements of due process are straightforward and non-onerous: a student subject to the denial of all educational opportunity for a substantial period of time must be accorded the following procedural rights:

1. "Advance written notice of the claimed violation and a written statement of the fact findings as to the evidence relied upon and the reasons for the disciplinary action taken." *Wolff v. McDonnell*, 42 U.S.L.W. 5190, 5198 (1974).

2. A meaningful opportunity to be heard, including the opportunity to present documentary evidence and to call witnesses if it would not be unduly disruptive of the educational process. Cf. *id.*

3. A prompt hearing, which, absent extraordinary circumstances, must precede the suspension. Compare *Goldberg v. Kelly*, 397 U.S. 254 (1970) with *Calero-Toledo v. Pearson Yacht Leasing Co.*, 42 U.S.L.W. 4693 (1974).

4. An impartial tribunal, *id.* at 5200, which is empowered to render a decision in the students' favor. See also *Arnett v. Kennedy*, 94 S.Ct. 1633 (1974); *Mitchell v. W. T. Grant Co.*, 43 U.S.L.W. 4671 (1974); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Goldberg v. Kelly, supra.*

If these rights are not extended to students, there can be no confidence in the rightness of the administrative deter-

mination of their case or in the legitimacy of the proceeding. Notice of the charges enables the student to marshall the facts and prepare his defense. *Wolff v. McDonnell, supra,* at 5198. Written records of the proceeding will enable the student to protect himself against collateral consequences based upon a misunderstanding of the nature of his misconduct, and to defend his cause before other tribunals. *Id.* The opportunity to be heard and to present documentary evidence and call witnesses assures the reliability of the school board's ultimate conclusions. And, obviously, the impartiality of the tribunal deciding the case is an absolute precondition to the rendering of a reliable and credible decision. Finally, the reasons for a prior hearing absent extraordinary circumstances are evident. Not only can an individual be significantly damaged by action taken before a hearing—the stigma of expulsion and lost school time in this case cannot be taken lightly—but in addition, because the posture of the parties changes, the issues may well be determined without fully open-minded consideration. For the decider may develop a stake in the action already taken without a proper hearing, and the position of the expelled student shifts from that of party to a dispute to that of supplicant with an attendant shift in presumption and burdens.

The federal court cases following *Dixon v. Alabama State Board of Education,* 294 F.2d 15 (5th Cir. 1961), have uniformly required these minimum ingredients. See, for example, *Hagopian v. Knowlton,* 470 F.2d 201 (2nd Cir., 1972); *Wasson v. Trowbridge,* 382 F.2d 807 (2nd Cir., 1967); *Woods v. Wright,* 334 F.2d 369 (5th Cir., 1964); *Williams v. Dade County School Board,* 441 F.2d 299 (5th Cir., 1971); *Esteban v. Central Missouri State College,* 277 F. Supp. 649 (W.D. Mo. 1967). Following the suggestion of Judge Rives in *Dixon* that the precise nature of the required hearing could only be determined from the circumstances of the particular case, there has been considerable variation in the decisions about issues like the degree of formality and promptness required of a hearing, presence of counsel, and the right to cross-examine witnesses. But there has been unanimity about the irreducible minimum.

This view of the minimal procedural guarantees required under the Due Process Clause does not suggest that a school discipline hearing must include the full panoply of procedural rights accorded a criminal defendant. Cf. *In Re Gault,* 387 U.S. 1 (1967). But those elements—listed above—which express "the rudimentary elements of fair play" must be observed. *Dixon v. Alabama State Board of Education, supra,* at 159. Moreover, this case does not require this Court to decide what protections, if any, might be required for very short-term suspensions or other instances of insignificant punishment, for this case clearly involves serious punishment under any conceivable view of that term.

III. Because Respondents in This Case May Not Have Been Accorded the Required Procedural Safeguards, the Case Should Be Remanded.

A. THE FEBRUARY 18, 1972 MEETING OF THE SCHOOL BOARD CLEARLY DID NOT REFLECT THE MINIMUM ELEMENTS OF DUE PROCESS.

The Board meeting was held on the evening of the same day that the Principal, Mr. Waller, suspended Respondents for one week. No notice of the Board Meeting was given to either Respondents or their parents. (Appendix, p. 54). The Principal had told Respondents merely that the matter would at some time be taken before the Board, and that their parents were permitted to be present at the Board meetings. Since this general statement to Respondents was made before the date or time for the meeting was set, this could hardly be considered notice—nor has anyone seriously suggested that it was. Neither Respondents nor their parents were present at the Feb-

ruary 18 Board meeting. If they had been present, they would have had an inadequate time to prepare their defense. *Wolff v. McDonnell,* 42 U.S.L.W. 5190, 5198 (1974). In short, there was not a single element of even a minimal due process hearing observed at the February 18 meeting.

B. THE MARCH 2 BOARD MEETING MAY NOT HAVE CURED THE PROCEDURAL DEFECTS OF THE PRIOR MEETING.

The record with respect to the March 2 meeting is fatally defective. The District Court, in holding for Petitioners, erroneously considered absence of malice dispositive.[5] At no stage of its proceedings did the District Court enter findings of fact as to the procedural adequacy of the disciplinary actions of the School Board. It entered no findings:

1. On Respondents opportunity to present evidence at the meeting of March 2, 1972;
2. As to whether the March 2 meeting was sufficient to remedy the deficiencies of the February 18 meeting; or
3. Whether, if there was a "hearing," it was timely.

Although the Court of Appeals expressed a view that the March 2 meeting of the Board might have cured the February 18 deficiencies, it quite explicitly refused to decide that question, because it based its reversal on its view that neither Board Meeting had accorded Respondents their

5. While it may be arguable that School Board members should be immune from punitive damages in the absence of a showing of malice, the complaint in this case also sought equitable relief, including "all other relief to which Plaintiffs may be entitled." (Appendix, p. 12). With regard to such equitable relief, or compensatory damages, this Court's earlier decisions make it quite clear that a showing of malice is not essential. *Monroe v. Pape,* 365 U.S. 167 (1961) (the term "wiliful" was not read into 1983). If the Respondents' Fourteenth Amendment rights were violated, they would be entitled to have their expulsion stricken from their records whether or not there is a showing of malice.

"substantive due process" rights. (Petition for Cert., p. A. 6).

1. The record fails to establish the timeliness of the March 2 hearing.

The decisions of this Court establish a presumption in favor of a prior hearing. That presumption can be overcome only when a prior hearing would substantially jeopardize significant interests of the public, see e.g. *Calero-Toledo v. Pearson Yacht Leasing Co.,* 42 U.S.L.W. 4693 (1974); *North American Storage Co. v. City of Chicago,* 211 U.S. 306 (1908), or where a subsequent hearing can plausibly be said to reflect a fair accommodation of competing private interests. See *Mitchell v. W. T. Grant,* 42 U.S.L.W. 4671 (1974).

Nothing in this record suggests that any significant interest would have been impaired had the School Board complied with the prior hearing requirement. Of course, one can imagine justifications for suspending students pending the outcome of a procedurally adequate hearing. But none are revealed here. We do not urge the Court, however, to affirm the decision below; the School Board should be given an opportunity on remand to establish extraordinary circumstances.

Moreover, if the Court holds that a prior hearing is not presumptively required, or if Petitioners on remand should establish extraordinary circumstances, there still remains the question of the promptness of the hearing after exclusion. *Mitchell v. W. T. Grant, supra; Freedman v. Maryland,* 380 U.S. 51 (1965). If a hearing is not held expeditiously, students may be deprived of their right to attend school for a substantial period of time without any opportunity to assert and prove their innocence. We do not think it appropriate to urge this Court to decide in the first instance whether the March 2 hearing—12 days after the defective

hearing of February 18—would have met the constitutional requirement of promptness. We do think it appropriate, however, to urge the Court to underscore the significance of promptness as a matter of due process and to insist that the lower federal courts not approve the imposition of serious punishment without a specific finding that a *prompt* as well as procedurally adequate hearing has been held, a finding neither court below has made.

But even if the March 2 hearing is regarded as timely, there are serious reasons to doubt its adequacy.

2. The record fails to establish that the March 2 meeting provided a meaningful opportunity to be heard.

a. The record suggests that the March 2 hearing may have been limited to the issue of punishment.

The Superintendent of Schools, in his initial letter to Respondents' parents informing them of the March 2 hearing, told them of their right to petition the School Board for "reinstatement" of their children. (Appendix, pp. 137-138). As the Board's own minutes reveal, the March 2 hearing began with a statement by the Board's counsel of "facts established" at the February 18 meeting. (Appendix, p. 106). Consistent with the Superintendent's letter and the Board's minutes, the record reveals no attempt at the March 2 hearing to dispute the underlying facts, but only an effort to persuade the Board that the punishment was excessive. If indeed no other issue was open on March 2, the hearing on that date obviously could not have cured the defects of the February 18 proceeding. At very least, this case should, therefore, be remanded for a determination of the scope of the hearing held on March 2.

b. Even if the March 2 hearing was not limited to the punishment issue, it may have been tainted by the Board's own prior action.

As we have urged in Section II, one of the reasons for a presumptive requirement of a prior hearing is the risk that a subsequent hearing will constitute only a perfunctory review of an action in which the decider has acquired a vested interest. Even if the Court is unprepared to hold on this theory that the March 2 hearing, absent extraordinary circumstances, came too late, and even if the March 2 hearing is found to have been of sufficiently broad scope, the distinct possibility remains that the School Board did not approach its task on March 2 as a truly impartial tribunal. Deeming the "facts" to have been "established", it might simply have proceeded in a manner calculated to vindicate its own prior conclusions. Although it is certainly arguable that the Board should have an opportunity on remand to establish that this did not occur, the absence of any finding by the courts below on the impartiality of the Board as of March 2 precludes a conclusion on this record that the hearing of that date cured the procedural inadequacy of the meeting which preceded it.

CONCLUSIONS

For the reasons stated above, if the Court in the context of this case decides questions relating to the procedural rights of Respondents, this Court should declare that due process guarantees Respondents a meaningful and timely opportunity to be heard, and the Court should thus remand

for further proceedings consistent with the principles here described.

Respectfully submitted,

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